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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 737

JAMES A. YATES,

Petitioner,

vs.

EDWARD EALE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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SUPREME COURT OF THE UNITED STATES

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No. 737

JAMES A. YATES,

Petitioner,

vs.

EDWARD BALL,

Respondent

PETITION FOR CERTIORARI

To the Honorable the Supreme Court of the United States:

Your petitioner, James A. Yates, respectfully represents that:

I

Summary and Short Statement of the Matter Involved

On June 21, 1933, petitioner, James A. Yates, as trustee, brought an action at law in a Florida state court against respondent, Edward Ball, on an oral contract to protect and pay a second mortgage on real property that Ball was buy-

ing.[1] When the case came on for trial the judge directed a verdict for Ball at the conclusion of the plaintiff's evidence. Yates appealed. The Florida Supreme Court reversed. It said the case was one for a jury (132 Fla. 132, 181 So. 341).[2]

The case went back for a second trial. The plaintiff put in the same evidence that he did the first time. The defendant put on his evidence, which consisted principally of a denial of the authority of the agent who acted for him in making the contract. The judge sent the case to the jury. The jury found for Yates in the sum of $195,000.00. A motion for a new trial was denied. Ball appealed. The Florida Supreme Court again reversed. It gave no understandable reason. 145 Fla. 537, 200 So. 701.[3]

The case went back for a third trial. The plaintiff amended his declaration as he had been expressly authorized to do, so that there could be no possible question of variance. He again put in the same evidence that he had on the two previous occasions. The defendant introduced the same evidence that he introduced on the second trial. The judge again sent the case to the jury. The jury again found for

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[1] This suit was really a continuation of certain chancery litigation between the same parties which had been to the Florida Supreme Court several times, on one of which occasions it was squarely held that the oral contract was not a promise to pay the debt of another within the statute of frauds. (*Yates* v. *St. Johns Beach Development Co.*, 118 Fla. 788, 160 So. 197.) Such oral contracts have always been held to be valid in Florida. (*Herrin* v. *Abbe* (1908), 55 Fla. 769, 46 So. 183, 18 L.R.A. N. S. 907.) The rule in Florida is the same as it is in this Court. (*Davis* v. *Patrick*, 141 U. S. 479.)

[2] Here the court again held that the statute of frauds had no application. This time—referring to the 1-year provision—it said: "The very predicate for application of the statute of frauds, a loose or casual statement galvanized with fraud, is absent in this case."

[3] The circuit judge, on the re-trial, said he didn't understand it and it was of no help to him. The court now says the language was "inadvertent." 158 Fla. 521, 528, 29 So. 2d 729, 733.

Yates for $243,041.68.[4] A motion for a new trial was again denied. Ball again appealed. The Florida Supreme Court again reversed.[5] *Ball* v. *Yates*, 158 Fla. 521, 29 So. 2d 729.

On the third appeal a majority of the court said that Yates had no cause of action in the first place, and no credible evidence to support it in the second place, and that the case never should have been submitted to a jury, after all the evidence was in, in the third place. It directed the lower court, when the mandate went down, to summon Yates to appear and show if he had any more evidence and, if not, to dismiss his case. The authority for this extraordinary procedure does not appear.

A petition for rehearing was thereupon seasonably filed and later denied. 158 Fla. 537, 29 So. 2d 737.

Based upon facts that were discovered after this decision, petitioner filed a supplemental petition for rehearing and a suggestion of disqualification under the statute[6] of Justices Buford and Adams. Briefly, the facts are these:

Justice Buford had made an agreement with the St. Joe Paper Company, the principal operating company of the duPont interests in Florida (of which the respondent, Ball,[7] is president and controlling director) covering more than 18,000 acres of land in Florida, for the purpose of mining and operating oil, gas and other minerals for the term of 10 years and as long thereafter as operations are in actual progress. The lease was signed by Ball on behalf of his company. By the terms of this instrument Justice Buford

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[4] This was the same verdict as on the second trial, the difference being in the accrued interest.

[5] The opinion was written by Circuit Judge Barns, concurred in by Justices Buford, Brown, Thomas and Adams; Chief Justice Chapman and Justice Terrell dissenting.

[6] Florida Statutes, 1941, Secs. 38.02, 38.10.

[7] The respondent, Ball, is trustee of the duPont estate.

and Ball's company became joint adventurers and profit-sharers in these operations as it was agreed that the yield therefrom would be divided between them on a royalty basis. Justice Buford did not deny the making of this contract but said that it did not prevent him from standing fairly and impartially between the parties. However, he did not do so.

Justice Adams, after the judgment appealed from was rendered and before the case was reached for consideration by the Supreme Court, borrowed $80,000.00 from the Florida National Bank of Jacksonville.[8] He states in his response to the suggestion of disqualification that the indebtedness was paid before the case was heard. One thing is certain—he didn't pay it out of his official salary of $9,000.00 per annum. However, before the ink was dry on the opinion and *before the time prescribed by the rules for filing a petition for rehearing had expired,* Justice Adams borrowed another $30,000.00 from the Florida Bank at Fort Pierce.[8] This indebtedness had not been paid and it is not so claimed. Justice Adams only said that the debt was amply secured and that he, too, stood fairly and impartially between the parties. His impartiality, like Justice Buford's, was manifested by lip service.

The two justices declined to recuse themselves and the court overruled the suggestion of disqualification as insufficient in law and in fact. 158 Fla. 530, 29 So. 2d 733. It denied the petition for rehearing.

The decision was by a divided court, 5 to 2. If the two justices charged with prejudice had voted with the petitioner, the decision would have been in his favor, 4 to 3.

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[8] These two banks, together with sixteen others located in various points in Florida from Pensacola to Key West, are owned and controlled by the duPont estate, of which the respondent, Ball, is the dominating and controlling trustee. All of these institutions are one hundred percent under Ball's control, and loans the size of these can be made only with his express approval.

It probably would have been unanimous for reasons which will be pointed out.

The petitioner made an effort to have this court review the case at that time but it declined to do so (332 U. S. 774). He felt that the judgment was final to all intents and purposes, although it subsequently developed that this was not the case.

When the mandate went down to the court of original jurisdiction the respondent moved for an order to show cause why final judgment should not be entered for him (R. 9-12). The court issued the rule (R. 13). In response thereto the petitioner challenged the power of the Florida Supreme Court to direct such a course but added that he had discovered other evidence available which would add substantially to the strength of his case (R. 14, 59). He was required to set out the substance of the additional evidence which the court held insufficient and entered final judgment for the respondent (R. 67-70).

Petitioner again appealed to the Florida Supreme Court. Justice Adams, upon petitioner's suggestion, voluntarily recused himself, but Justice Barns declined to do so and an affidavit of disqualification was filed against him, which the court denied (R. 73-85).

Thereupon petitioner made application to recall the mandate and affirm the judgment of March 8, 1945, which was likewise denied (R. 86-96, 102). The court then in a hearing on the merits, by a per curiam opinion concurred in by four justices, with three dissenting, affirmed the judgment of the Circuit Court of Duval County dismissing the plaintiff's action (R. 102). The decision is not yet reported. It is to review this final judgment that the writ of certiorari is sought.

On January 13, 1950, the Florida Supreme Court denied the petitioner's application for rehearing and subsequently

granted a stay of the mandate for ninety days to enable petitioner to apply to this court for certiorari (R. 111, 112).

Whether the judgment was final before or not it is certainly final now.

II

Statement Particularly Disclosing the Basis upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

This court has jurisdiction to review the judgment in question under Section 1257 of the Judicial Code (Title 28, Sec. 1257, U. S. Code), in that it is the final judgment of the highest court of the state in which a decision could be had, and where a right, privilege or immunity was specially set up and claimed by the petitioner under the Constitution as (a) a denial of due process of law and of the equal protection of the laws; (b) a denial of the right of trial by jury secured under the seventh amendment;[9] (c) a denial of the right of trial by jury secured under the Florida Constitution;[10] and (d) obstructing justice under the Civil Rights Act (Title 8, Sec. 47 (2), U. S. Code).

III

The Questions Presented

1. Where a state court, on appeal from a judgment directing a verdict for the defendant in an action at law, has held that the plaintiff's evidence proved the essential

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[9] While the seventh amendment originally was applicable only to courts of the United States, we shall endeavor to show that the fourteenth amendment made the first eight amendments applicable to the states.

[10] Florida was not one of the thirteen original states. It was admitted as a state by Acts of Congress hereinafter cited, on the express condition that it adopt a constitution setting up a republican form of government in conformity with the principles contained in the Constitution of the United States and adopting a bill of rights for the same.

elements of the contract sued on without material variance, that there was ample showing of the authority of the defendant's agent to act for him, and that the issue was one for a jury to determine, thus establishing the law of the case, may it hold, consistently with the due process and equal protection clauses, after two juries subsequently rendered verdicts in the plaintiff's favor, that the same evidence is insufficient to establish a cause of action and order the plaintiff nonsuited?

2. Where a state court has held, on an appeal from a judgment on a directed verdict for the defendant, that the plaintiff's evidence was sufficient to entitle him to go to the jury, and thereafter in two successive trials the jury returns a verdict for the plaintiff, does the reversal of the plaintiff's judgment by the state court of last resort with directions to dismiss the case invade the province of the jury and deny the plaintiff the rights secured to him by the seventh amendment?

3. Where a state, not being one of the original thirteen, was authorized to be admitted to the Union on the express condition that it adopt a constitution setting up a republican form of government and "in conformity to the principles contained in the Constitution of the United States" and such constitution was expressly approved by the Congress when the state was admitted, was the effect to render obligatory the maintenance of these approved constitutional provisions so that a violation of them infringes a Federal right?

4. Does due process of law insure a litigant a fair trial by an impartial court, and is he denied due process when it is shown that two of the judges of a state court of last resort have had financial transactions with his adversary of such a nature and of such magnitude as to justify the

litigant's fear of their impartiality, especially so when the majority required to reverse the judgment in his favor necessarily included the two judges whose impartiality was challenged?

5. Does the conduct of respondent, Ball, in his transactions with two of the justices fall within the provisions of the Civil Rights Act (Title 8, Section 47 (2), U. S. Code), defining obstructing justice "if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws"?

IV

Reasons Relied On for the Allowance of the Writ

The case involves public questions hitherto not directly decided by this court:

1. Whether or not the fourteenth amendment makes the seventh amendment applicable to state action.

2. Whether or not the admission of a state into the Union upon the condition that it submit for approval a constitution setting up a republican form of government and containing a bill of rights, creates an enforceable Federal right.

3. Whether or not due process of law is denied to a litigant by the action of a state court in compelling him to submit his cause to a tribunal consisting of judges disqualified by reason of prejudice in favor of his adversary.

4. Whether this violates the Civil Rights Act.

5. Whether or not this court is authorized to review the judgment of a state court of last resort reversing two jury verdicts after it had held that the plaintiff's case was sufficient to entitle him to a jury trial.

6. Whether or not this court is authorized to review the judgment of the highest court of a state consisting of disqualified justices as a denial of due process under the fourteenth amendment.

The premises considered, your petitioner prays that a writ of certiorari may be issued to the Supreme Court of Florida requiring it to transmit to this court under its official seal a true and correct copy of the record of its judgment herein for such further relief as, upon consideration thereof, this court shall find the petitioner is entitled to receive.

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HARRY T. GRAY,
Attorneys for Petitioner.

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Supreme Court of the United States

No. _____

JAMES A. YATES, PETITIONER,

VS.

EDWARD BALL, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The sheer statement of this case is the strongest reason that the petitioner can advance to this Court for the allowance of the writ. It is simply inconceivable that the court of last resort of a sovereign state did what the Florida court did in this case. When courts do things like the Florida court did here, it is small wonder that the people lose confidence in them.

QUESTIONS NUMBERS 1, 4 AND 5.

Denial of Due Process—Civil Rights.

It became obvious that sinister influences were at work in this case when, on the second appeal the Court reversed a judgment for plaintiff on a jury verdict after

having held, on the first appeal, that the case was one for a jury to decide.

This is so because the Court gave no understandable reason for so doing. It was a *per curiam* opinion and when an examination of the Court's original files was made for the purpose of ascertaining who its author was, *it could not be found.* It is more so because Justice Buford undertook, in an opinion that failed to secure concurrence of a majority, to repudiate practically everything that had been decided on the first appeal.

As time passed indications of insidious activity accumulated. Strange rulings were made. Note the concluding paragraphs of the last opinion about the Court's reversal of its rulings on motions to strike the brief. These were followed by sudden and unexplained efforts to hasten the final hearing of a case where dilatory tactics had been the consistent policy of the defense for fifteen years. The case was advanced on the calendar of oral arguments and one of the concurring justices resigned *the next day* after the decision was rendered under the judicial retirement act. He had been eligible for retirement for more than a year.

Petitioner and his counsel had suspected for some time that the Court was not functioning as a free agent. These suspicions at first could not be verified. After the third decision—totally inexplicable on the basis of honest, unprejudiced judicial consideration having due regard for established precedents—he became convinced that something was wrong. Shortly rumors began to leak out that some of the members of the Court had been having some financial dealings with the respondent and his banks and holding companies. Petitioner sent abstractors to certain counties of the state and found that

(a) Justice Buford, between the second and third appeals, had been given an oil lease by Ball's principal holding company, on some 18,000 acres of land, for ten years, *on a profit sharing basis.*

(b) Justice Adams, *after the judgment appealed from was rendered,* borrowed $80,000.00 from Ball's principal bank, of which both *his counsel in this case were and still are directors.* The loan on its face was for one year. *Before it was due* a purported satisfaction was put on record. *Five days* after the decision was rendered and *before the time for filing petition for rehearing had expired* Justice Adams borrowed another $30,000.00 from another of Ball's chain of eighteen banks. It isn't claimed that this loan has been paid, only that it is "amply secured."

The lengths to which the Supreme Court of Florida went in its decision on the third appeal of this case, in order to relieve from the burden of two jury verdicts the man with whom two of its members were financially involved, compel a somewhat more detailed review of the case than properly could be put in the petition for certiorari.

SHORT RESUME' OF THE CASE.

First Appeal.

As stated, upon the first trial the circuit judge directed a verdict for the defendant at the close of the plaintiff's testimony. Apparently he thought that the plaintiff's evidence did not establish a cause of action. The plaintiff appealed. The Florida Supreme Court reversed and held squarely that the plaintiff's evidence did establish his case and it should have been submitted to the jury. *Yates* v. *Ball,* (1938) 132 Fla. 132, 181 So. 341.

Second Appeal.

When the case went back for the second trial the plaintiff put in substantially the same evidence that he introduced on the first trial and which the Court had held was sufficient and entitled him to go to the jury. The defendant then put on his evidence. This evidence consisted principally of a denial of the authority of his agent to make the contract. Indeed, he could do little else because he took the position that he had no knowledge of the contract until long after it was made. In this connection it might be observed that there was no doubt whatsoever that the contract was made, because both the agent of the plaintiff, who acted for him, and the agent of the defendant, who acted for him, testified on behalf of the plaintiff and each asserted that the contract as set out in the declaration was made.

The defendant's denial of his agent's authority did not weaken the plaintiff's evidence, which had been held to be sufficient. It produced only a factual issue that was the jury's province to try. The jury believed the plaintiff's witnesses and found a verdict for him. In this it may have been influenced somewhat by the fact that there was much evidence of ratification, including Ball's admission that he had made three semi-annual interest payments not only on the plaintiff's second mortgage, but also on the first mortgage against which he had agreed to protect the plaintiff. In short, he put some seventy odd thousand dollars in the property over a period of a year and a half. He admits that he was speculating with it. The last interest payment he made was in June, 1929, and the next one was due December, 1929. In the meantime, the memorable stock market crash occurred, rich men were frightened out of their wits, capital was scurrying to cover, and Ball simply repudiated his contract.

The circuit judge declined to disturb the jury's verdict. Ball appealed. In an opinion in which we insist no reason was given, the Supreme Court reversed the circuit judge for doing the very thing that it reversed him for not doing on the first appeal, namely, submitting the case to the jury. *Ball* v. *Yates,* (1940) 145 Fla. 537, 200 So. 692.

Third Appeal.

The plaintiff accepted the mandate of the Court with good grace. He amended his declaration and submitted his case to a third jury.[1] His evidence was the same as before. The defendant put on his proof, which was the same as on the second trial. The jury found for the plaintiff. The trial judge refused to disturb the verdict. Ball appealed and the Florida Supreme Court again reversed.

FLAGRANT CHARACTER OF THIRD DECISION.

Courts have no more right to play fast and loose with litigants than litigants have to play fast and loose with the Courts. If the evidence adduced by plaintiff in an action is sufficient on one trial, the same evidence is sufficient on every trial thereafter. It can never become insufficient. Of course, there are cases where some affirmative defense, such as limitations, is established which require a directed verdict, but all such defenses had been ruled out.

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[1]The third opinion says that the Court held on the second appeal that the evidence was insufficient to support the verdict and was intended to dispose of the case. 158 Fla. 521, 29 So. 2d 729. *That is not true.* If it were, the Court should have said so. See Judge Terrell's dissent. 158 Fla. 540, 29 So. 2d 739. Why did the Court expressly grant plaintiff leave to amend his declaration if it intended to dispose of the case? 145 Fla. 537, 200 So. 692.

To make it clear how the Supreme Court of Florida has in effect repudiated almost every material ruling on the first appeal, we set forth in parallel columns excerpts from the two opinions on the principal points in the case.

Yates v. *Ball*, (decided Oct. 13, 1937) 132 Fla. 132, 181 So. 431.	*Ball* v. *Yates*, (decided Nov. 29, 1946) 158 Fla. 521, 29 So. 2d 729.
Suttles' Agency.	
"There was ample showing of Suttles' authority to act for Ball.	"We are of the opinion that the evidence fails to establish facts sufficient to permit an inference that Suttles was the authorized agent of Ball.
"He (Ball) must have considered the agreement perfected and closed else he would not have expended so much in compliance with its terms on his part.	"And likewise it is not sufficient to establish ratification.
The Making of the Contract.	
"The evidence shows that Suttles, as the authorized representative of Ball, negotiated with the second mortgage bondholders and made the agreement between them and Ball on which this action is grounded.	"The evidence fails to support an enforcible contract between Ball and Marks prior to June 1, 1928, and likewise the evidence fails to establish ratification subsequent thereto."

"Much of this evidence is confusing, some of it is immaterial, but our conclusion is that the essential elements of the contract declared on were proven, that Ball accepted its terms and that there was no material variance between the proof and the agreement."

These statements cannot be reconciled. One says "white," the other says "black." Specious reasons tend only to emphasize them.

In order to explain why the Court felt warranted on the third appeal in overturning the verdicts of two juries and the settled law of the case, as decided in the first appeal, Mr. Justice Barns,[2] after referring to his interpretation of the second appeal, makes this amazing statement:

> "If there be any conflict between the law of the case as established by the first appeal with the law of the case as established by the second appeal then in that event *the latter will control over the first*" (Italics ours).

It is amazing for the following reasons:

(1) No authority is cited for it and none can be found. Judge Barns invented it. He conjured it up to defend an indefensible position.

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[2]Judge Barns was in no position to construe the Court's meaning on the second appeal. He was not a member of the Court at that time. He was a circuit judge in Miami. See *Pennekamp* v. *Florida*, 328 U. S. 331.

(2) It is in direct conflict with the recent opinion of the Court, by Mr. Justice Thomas,[3] in *Provident Life & Accident Insurance Company* v. *Mathers,* 157 Fla. 661, 26 So. 2d 814, in which he said that the law of the case was settled on the *first* appearance of an action in the appellate court.

(3) To so hold ignores the reason for "the law of the case" and goes to its very foundation.

THE LAW OF THE CASE.

The rule is one of expediency. It is designed to terminate litigation. In the old cases it is pointed out that were it not for this rule the lower court would be free to decide questions as it saw fit. It could then engage in a game of battledore and shuttlecock with the appellate court. Litigants could gamble freely on changes in the personnel of the court. The result would be interminable litigation. If the law announced by Mr. Justice Barns is correct the whole purpose of the rule is defeated. This is so because when the case goes back to the lower court it may decide questions already adjudicated as it will. Then on the second appeal the appellate court may say that perhaps it was mistaken in its first decision and the lower court was correct after all. Then it could reverse itself on the third appeal and so on *ad infinitum.* If the rule is to be enforced it must bind everybody—parties, counsel, lower courts and appellate courts—and the individual judges thereof—alike. The appellate court in the same case cannot render a second decision in conflict with its first. If it does the second must be held for naught.

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[3]And yet Judge Thomas concurred in this opinion! How can Judge Thomas subscribe to both?

In short, after the law of the case is announced on the first appeal, neither the lower court nor the appellate court will be heard thereafter to hold any point contrariwise. Otherwise we strike at the roots of the rule and deal it a blow that will ultimately bring about its disuse.

WHAT THE COURT REALLY INTENDED ON SECOND APPEAL.

Judge Terrell, who wrote the opinion on the first appeal, has this to say with reference to the second appeal:

> "I do not understand the reversal in second appeal to have been on the ground that the evidence would not support an affirmative verdict under any circumstances. I thought that the interests of all parties under the circumstances would be better served by letting another jury pass on the evidence. That has been done and I think the verdict and judgment should stand." 158 Fla. 541, 29 So. 2d 739.[4]

This Court has declared:

> "It is the settled law of this court, *as of others,* that whatever has been decided on one appeal or

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[4]The Florida Court has done this before. *Ellis* v. *State,* (1923) 86 Fla. 155, 97 So. 285; *Foster* v. *Thornton,* (1935) 119 Fla. 49, 160 So. 490. But Judge Barns (who, as stated, was not a member of the Court at the time) says that the second reversal was not based on any supposed variance between the pleadings and the proof, and if the language of the opinion be taken literally and so construed, it was "inadvertent." His statement is not in harmony with the record as pointed out in the petition for rehearing. Courts ought not to use language inadvertently. It affords little comfort to people of small means who carry on expensive law suits in the expectation that the Court has said what it meant and that the verdict of a jury on evidence held to be legally sufficient will be upheld.

writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. *The first decision has become the settled law of the case*" (Emphasis supplied).

Thompson v. *Maxwell Land Grant & R. Company*, (1897) 168 U. S. 451.

FLORIDA SUPREME COURT HAD NO POWER TO DEPART FROM LAW OF THE CASE.

As this Court said, that is the law in other courts as well and has always been the law in Florida. Indeed, the Florida Supreme Court, before this decision, had held that it was *without authority* to review or reverse what it had heretofore decided as the law of the case even if it were so inclined. *Family Loan Company* v. *Smetal Corporation*, (1936) 123 Fla. 900, 169 So. 48.

Neither Mr. Justice Barns, of the Florida Supreme Court, nor the respondent's counsel in this case can find any case in any English-speaking jurisdiction to support his assertion that "if there be any conflict between the law of the case as established by the first appeal with the law of the case as established by the second appeal then in that event the latter will control over the first." As a matter of fact, there was no such conflict, for the ruling on the second appeal of necessity reaffirmed that on first appeal.

DUE PROCESS WAS DENIED.

A thing like this is shocking to the conscience. Ball's transactions with members of the Court offer the only explanation. That it is a denial of due process of law and of the equal protection of the laws, there can be no doubt.

In *Buchalter* v. *New York,* (1943) 319 U. S. 427, the Court say:

> "The due process clause of the Fourteenth Amendment requires that action by a state *through any of its agencies* must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land' " (Emphasis supplied).

See also *Hebert* v. *Louisiana,* (1926) 272 U. S. 312.

In reaching his conclusions Judge Barns ran roughshod over at least seven previous opinions of the Florida Court:

(1) *Yates* v. *Ball,* (first appeal) (1938) 132 Fla. 132, 181 So. 341, which held that a contract was proved, agency was established, and that the jury should have been permitted to pass upon the issues after the introduction of the defendant's testimony;

(2) *Yates* v. *St. Johns Beach Development Company,* (1935) 118 Fla. 788, 160 So. 197, which held that the contract was not within the Statute of Frauds;

(3) *Sanders* v. *State,* (1921) 82 Fla. 498, 90 So. 455, and *Rogers* v. *State,* (1945) 156 Fla. 161, 23 So. 2d 154,[5] which held that where a conclusion upon a material question was inevitable, except for which the judgment would have

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[5]The Rogers opinion is a recent one (1945) by the disqualified Justice Buford. As we have pointed out, the Florida Supreme Court held squarely in the chancery suit (118 Fla. 788, 160 So. 197) *that this very contract was not within the Statute of Frauds.* The point was admittedly argued on the second appeal *in this case.* That it is decisive there can be no doubt. Therefore, under the Court's own decisions it was not an open question.

been otherwise, it will be held to be adjudicated although not stated in express words;

(4) *Family Loan Company* v. *Smetal Corporation,* (1936) 123 Fla. 900, 169 So. 48, which held that on a second appeal the Court is "*without authority* to review or reverse what it has heretofore decided as the law of the case even if it were so inclined";

(5) *Provident Life & Accident Insurance Company* v. *Mathers,* (1946) 157 Fla. 661, 26 So. 2d 814, which held that the law of the case was settled on the first appeal; and

(6) *Southern Express Co.* v. *Stovall,* (1918) 75 Fla. 1, 77 So. 618, which held that "a second verdict upon the same state of facts, even though the judges might have to come to a different conclusion, is too strongly fortified by the judgment of twelve men to warrant an appellate court in disturbing it except for strong reasons."[6]

Judge Barns, in his opinion, ran the whole gamut of judicial licentiousness from misstatement of the facts to distortion of the law, digressing for exploratory sallies into realms of speculation to which the doors had been closed by the sworn testimony of witnesses and the verdict of the jury.

LINE-UP OF COURT.

This decision reversing the judgment based on the jury's verdict was 5 to 2. It was written by Circuit Judge Barns, concurred in by Justices Brown, Buford, Thomas and Adams. Chief Justice Chapman and Justice Terrell

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[6]Only once before in a hundred years of statehood has the Florida Supreme Court presumed to overthrow the verdicts of two juries.

dissented. If Justices Buford and Adams had voted to sustain the judgment, it would have been affirmed 4 to 3. If, when their disqualification was called to the attention of the Court, they had recused themselves and two circuit judges had sat in their places and had voted with the minority, the judgment likewise would have been sustained. Petitioner, however, had no such chance for a fair and impartial hearing. Two of the justices who sat in judgment on his case were already deeply committed to his opponent.

PETITIONER ACTED PROMPTLY.

The financial dealings of Justices Buford and Adams with respondent were called to the attention of the Court informally, as soon as they were discovered. The two justices declined to recuse themselves. A supplemental petition for rehearing was then filed as was done in recent case in the United States Court of Appeals for the Second Circuit, based on the disqualification of Judge Manton, which was not known at the time of the original decision. *Electric Auto-Lite Company* v. *P. & D. Mfg. Company,* (1940) 109 F. 2d 566; *General Motors Corporation* v. *Preferred Electric & W. Corporation,* (1940) 109 F. 2d 615.

In this supplemental petition for rehearing Section 4 of the Declaration of Rights of the Florida Constitution was invoked. It provides:

> "Section 4. *Courts open to everyone; remedy for wrongs.*—All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice shall be administered without sale, denial or delay."

Such provisions have been held to prohibit a judge from trying a cause in which he has prejudice in favor or against a party. *Castleberry* v. *Jones,* (1940) (Okla.) 99 Pac. 2d 174.

The petitioner took the position that he did not question the legal rights of the justices to have these financial transactions with his adversary. He merely questioned their rights, having done so, to sit in judgment in his case.

CANONS OF JUDICIAL ETHICS ARE A MOCKERY AND A SHAM.

Some few years ago, with the personnel of the Court practically the same, the Florida Supreme Court adopted Canons of Professional Ethics for Judges.[7] It was pointed out that the transactions by Justices Buford and Adams with the respondent, Ball, and his banks and corporations violated at least *ten* of the Canons of Ethics promulgated by the Court itself. Yet the justices refused to recuse themselves and the Court held that the suggestion of disqualification was insufficient in law and in fact. The justices then declared that they stood fairly and impartially between the parties and proceeded to reverse the petitioner's judgment.[8]

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[7]These are substantially those prepared by the American Bar Association. They appear in Volume 125, Florida Reports 522, 145 Florida Reports 763, and in the Appendix to the Florida Statutes of 1941.

[8]Even after this supplemental petition was filed and denied it was discovered that Justice Buford had made another oil and gas lease with another one of Ball's companies on land in Franklin County, and that the St. Joe Paper Company had conveyed to his wife, Mary H. Buford, property in Franklin County by deed reciting a consideration of $1.00.

THE COURT WAS NOT WILLING TO APPLY TO ITSELF RULES IT PRESCRIBED FOR OTHERS.

No court in the United States has been more ready to force the retirement of judges of inferior state courts when charged with prejudice than has the Florida Supreme Court.

In a long line of cases the Court has compelled judges of the trial courts to step aside when any suggestion of impartiality was made. It has held consistently:

> "This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge."

State ex rel. Mickle v. *Rowe,* (1930) 100 Fla. 1382, 131 So. 331; *Villeneuva* v. *State,* (1937) 127 Fla. 724, 173 So. 906; *State ex rel. Davis* v. *Parks, Judge,* (1939) 141 Fla. 516, 194 So. 613; *State ex rel. La Russa* v. *Himes,* (1940) 144 Fla. 145, 197 So. 762.

And yet the Court that promulgated these high-sounding Canons of Ethics and announced these decisions held that the petition for disqualification was insufficient in law and in fact.[9]

DISQUALIFICATION IN FLORIDA IS STATUTORY.

Florida has statutes dealing with the disqualification of judges, which are applicable to justices of the Supreme

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[9]The Florida Court had held expressly that a judge who was a depositor and creditor of a closed bank was disqualified to sit in liquidation proceedings. *State ex rel. Burton* v. *Barker, Judge,* (1929) 98 Fla. 273, 123 So. 738.

Court, although they have never before been invoked against them (Sections 38.01-10, Florida Statutes, 1941). In the Court's opinion overruling the suggestion of disqualification it was not held that the petition was defective in form, although there is a veiled criticism of the petitioner for not filing it sooner. The Court said:

> "The policy of the law as expressed in the statute is that suggestion of disqualifications shall be filed before the trial and before decisions are rendered and not afterward, unless the delay is excused by good cause shown."

The suggestion of disqualification declared on oath that the facts were not discovered until after the decision and the time had expired for filing a petition for rehearing,[10] and the Court apparently forgot that the principal fact concerning Justice Adams' disqualification *could not have become known* until after the decision was rendered, namely, his borrowing $30,000.00 from the Florida Bank at Ft. Pierce on December 4, 1946, as the opinion concludes:

> "The law does not favor the substitution of a Judge or Justice in a cause after decision which essentially carries a benefit to the successful party, yet it favors judges lending themselves to promoting confidence in the Court's acts when no injustice will be worked thereby."

We dare say that the episode did not do much to promote confidence in the Court's acts in Florida.

Justice Buford, in a statement made by him concerning the suggestion of disqualification, says:

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[10]In Judge Manton's case the facts were not discovered until *five years* after the decisions. Nonetheless, the Court of Appeals (2nd) granted rehearings. 109 F. 2d 566, 641.

> "I am conscious of no bias or prejudice[11] for or against either party to this suit and there is no logical reason for anyone to assume that either exists. The record shows that my position and opinion has been consistently the same from the first appearance of this case here to date. See *Yates* v. *Ball*, 132 Fla. 132, 181 So. 341, opinion filed October 13th, 1937; *Ball* v. *Yates*, 145 Fla. 537, 200 So. 695, opinion filed May 3rd, 1940, and *Ball* v. *Yates*, opinion filed November 29th, 1946."

This statement shows that Justice Buford is disqualified and is an admission of it. It is true that he dissented on the first appeal and he had a right to do so, but when the Court overruled him and held contrariwise, he was as much bound by the decision as anyone else, and thereafter he did not have a right to maintain that his position was consistently the same from the first appearance of the case to date. If he had not been prejudiced, his position would have been in accordance with the decision of the Court. He refused, however, to be bound by it and continued his fight on Ball's behalf.[12]

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[11]It is the "unconscious" mind that is prejudiced—not the conscious one. The conscious mind is free (perhaps) from prejudice. Doubtless the witch burners were "conscious of no bias or prejudice." That afforded little solace to their victims.

[12]Compare the attitude of Justice Buford with that of Justice Holmes in *Murphy, Attorney General of Arizona*, v. *Sardell*, (1925) 269 U. S. 530, where this appears: the judgment of the lower court was affirmed on the authority of *Adkins* v. *Children's Hospital*, 261 U. S. 525, in which Justice Holmes wrote a vigorous dissent. When the same question (not the same case) came before the Court again Justice Holmes requested "that it be stated that his concurrence is solely upon the ground that he regards himself bound by the decision in *Adkins* v. *Children's Hospital*." For a stronger reason Justice Buford should have considered himself bound by a prior decision in the same case.

Justice Buford is a man of considerable ability. His temperament is not a judicial one. It is that of the advocate. When he takes a position in a case it is a vigorous, persistent one and one that is calculated to bring over less resolute colleagues. As the supplemental petition for rehearing shows, on second appeal he wrote an opinion that did not become the opinion of the Court but it advocated, in effect, his original position and would have overthrown everything that the Court had done. It is with extreme difficulty that the petitioner can contemplate Justice Buford's attitude being that of "the cold neutrality of an impartial judge" that the Florida Court has held that he is entitled to, particularly those of us who had the opportunity to observe his hostile attitude on the Court and had to answer his obviously partisan questions.

In *Tumey* v. *Ohio,* (1927) 273 U. S. 510, this Court held that "an accused is unconstitutionally deprived of due process of law if his liberty and property are subjected to the judgment of a court the judge of which has a direct and substantial pecuniary interest in reaching a conclusion against him." That case, it is true, was one in which the salary of the judge was paid from a fund made up from fines imposed for misdemeanors. However, the principle is the same. Certainly, if it were proved that a judge had been bribed by a party, his adversary would be no more likely to receive a fair trial (if as much so) as he would in a case where the judge's salary was paid from a fund made up from fines imposed by him. Now, by the same token, if a judge has put himself under obligations to a party to a case to the extent that he cannot stand fairly and impartially between that party and his adversary, surely there has been the same denial of that character of fair trial that the due process clause contemplates.

In *Jordan* v. *Massachusetts,* (1911) 225 U. S. 176, this Court said:

> "Due process implies a tribunal both impartial and mentally competent to afford a hearing."

This case and *Tumey* v. *Ohio, supra,* were relied upon by the Court of Appeals, Seventh Circuit, in the case of *Inland Steel Co.* v. *National Labor Relations Board,* (1940) 109 F. 2d 9, wherein it held:

> "That a trial by a biased judge is not in conformity with due process is sustained by the authorities."

Continuing the Court said:

> "The principle is aptly stated in *People* v. *Naimark,* 154 App. Div. 760, 139 N. Y. S. 418, 420, where it is said: '* * * The first idea in the administration of justice * * * is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice.'
>
> "And the fact that the court's judgment may be justified on the merits does not obviate the requirement of a fair trial. As was said in *Union Pacific R. Co.* v. *Syas,* (8 Cir.) 246 Fed. 561, at page 568: '* * * But no judgment is just, if not obtained by due process of law; otherwise, courts could enter judgments without trial.' * * *"

In *Whitaker* v. *McLean,* (1941) 118 F. 2d 596, the Court of Appeals for the District of Columbia reversed the District Judge for remarks made about one of the parties in a colloquy with counsel, in the absence of the jury, over his protest that he "felt no hostility to the plaintiff" and was free from bias saying that judges should not only be impartial but should "give assurance that they are impar-

tial." The Court added that its reversal of the case was more regrettable because of its impression, based on an examination of the record, that the claim on which the plaintiff sued was probably without merit.

Referring again to *Buchalter* v. *New York, supra,* so recently announced by this Court, "the due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.'"

THE COURT ATTEMPTED TO PREVENT REVIEW BY THIS COURT.

In the supplemental petition for rehearing (which was the first opportunity petitioner had for raising the point) the Court was put on notice of petitioner's contention that the participation by Justices Buford and Adams in the consideration of the case and the rendition of judgment had operated to deprive petitioner of rights guaranteed to him by the Federal Constitution. The opinion overruling the suggestion of disqualification and denying the petition for rehearing appears to be a studied effort to avoid or evade the Federal question and to circumvent petitioner's efforts for review in this Court, which, in and of itself, is an admission of the charge and a manifestation of the attitude alleged by the petitioner. In no way can a judge betray his prejudices more glaringly than by making an obvious effort to cut off a review of his ruling by a higher court. The writer of this memorandum has upon at least six prior occasions, when some phase of this litigation was before the Supreme Court of Florida, successfully resisted respondent's contention that this identical contract was

within the Statute of Frauds. On no occasion was respondent's contention sustained before. On the contrary, in every case it was either flatly rejected, or held to have been adjudicated and become the law of the case, or ignored. For the Court, after more than fifteen years of litigation, to say that this case was within the statute in an effort to prevent review by this Court, is nothing short of a fraud itself.

QUESTIONS NUMBERS 2 AND 3.

Denial of Jury Trial—Federal, State.

After the Florida Supreme Court had held on the first appeal that the plaintiff's evidence was sufficient to entitle him to go to the jury and reversed the trial judge for taking the case away from the jury, the setting aside of two successive jury verdicts thereafter rendered on the same evidence which had been held sufficient was a denial of rights guaranteed by the seventh amendment.

FLORIDA SUPREME COURT MISCONCEIVED THE APPELLATE FUNCTION.

What the majority of the Florida Court actually held on the third appeal was that they would like to believe the defendant's evidence as against the plaintiff's. They had neither legal nor moral right to do this. Apparently the Florida Supreme Court misconceived the appellate function. It was not trying the controversy between Yates and Ball. It was determining only whether the lower court in submitting the case to the jury proceeded according to law. That was its function and its only function and any other one that it assumed was sheer usurpation. *Lavender* v. *Kurn*, (1946) 327 U. S. 645.

In a still more recent case following *Lavender* v. *Kurn*, this Court said:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury (Citing cases). Once there is a reasonable basis[13] in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavender* v. *Kurn, supra* (327 U. S., p. 652, 90 L. Ed. 922, 66 S. Ct. 740). And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury (Citing cases).
>
> "We think the evidence raised substantial questions for the jury to determine and that there was a reasonable basis for the verdict which it returned." *Ellis* v. *Union Pacific Railroad Company,* (1946) 329 U. S. 649.

THE SEVENTH AMENDMENT.

It is quite true that the seventh amendment purports on its face to be applicable only to courts of the United States and in earlier days was held to be confined to these tribunals. However, on its face, the seventh amendment is not more applicable to the Federal Government than is the first amendment. Originally the first amendment was held to impose a restraint only on the Federal Government and not to impose on the states any restrictions respecting

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[13]In this case the Court had said, on the first appeal, that there was such a basis.

freedom of speech. *Prudential Insurance Company* v. *Cheek,* (1922) 259 U. S. 530.

Since that time, however, this Court consistently has held that freedom of speech and liberty of the press was safeguarded by the due process clause of the fourteenth amendment. *Near* v. *Minnesota,* (1930) 283 U. S. 697; *Grosjean* v. *American Press Company,* (1936) 297 U. S. 233.

In the last mentioned case the Court said:

> "But in *Powell* v. *Alabama,*[14] 287 U. S. 45, 65, 68, 77 L. Ed. 158, 168, 170, 53 S. Ct. 55, 84 A. L. R. 527, we held that in the light of subsequent decisions the sweeping language of the Hurtado Case could not be accepted without qualification. *We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment,* and among them, the fundamental right of the accused to the aid of counsel in a criminal prosecution.
>
> "*That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause* of the Fourteenth Amendment against abridgment by state legislation, has likewise been settled by a series of decisions of this court, beginning with *Gitlow* v. *New York,* 268 U. S. 652, 666, 69 L. Ed. 1138, 1145, 45 S. Ct. 625, and ending with *Near* v. *Minnesota,* 283 U. S. 697, 707, 75 L. Ed. 1357, 1362, 51 S. Ct. 625" (Emphasis supplied).

No one would think of contending today, in this Court, that freedom of speech and of the press, guaranteed by the first amendment, was not binding on the states.

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[14]*Powell* v. *Alabama* holds that the *Sixth Amendment,* insuring the assistance of counsel in criminal cases, was applicable to prosecutions in state courts by virtue of the due process clause.

As the Court said in *Murdock* v. *Pennsylvania,* (1942) 319 U. S. 105:

> "The 14th Amendment makes the 1st Amendment applicable to the states."

Now, as we have pointed out, the first amendment, on its face, is more specifically limited to federal action than the seventh, and this Court has said in the *Grosjean case, supra,* that "certain fundamental rights, safeguarded by the *first eight amendments* against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment."

In *Dimick* v. *Schiedt,* (1935) 293 U. S. 474, it was held:

> "The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy' (Bk. 3, p. 379); and, as Justice Story said (2 Story, Const., Sec. 1779), '* * * the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.' With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a factfinding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Compare *Patton* v. *United States,* 281 U. S. 276, 312, 74 L. Ed. 854, 869, 50 S. Ct. 253, 70 A. L. R. 263."

That the first amendment is "*now* made applicable to all the States by the Fourteenth" was re-affirmed as recently as February 29, 1947, by Mr. Justice Rutledge in his dissenting opinion (concurred in by Justices Frankfurter, Jackson and Burton) in *Everson* v. *Board of Edu-*

cation of the Township of Ewing, N. J., 330 U. S. 1, citing *Schneider* v. *Irvington*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Prince* v. *Massachusetts*, 321 U. S. 158; *Thomas* v. *Collins*, 323 U. S. 516.

Conceding, for the sake of argument, that the nation or the state, consistently with the due process clause, may substitute for the jury another method of trial of common law and criminal cases, Florida has not done so: the Federal Government has not done so. It well may be doubted if either could do so as respects pending actions.

THE FLORIDA BILL OF RIGHTS WAS VIOLATED.

As far as we know, the question here presented is one of first impression. That, however, in and of itself, is no reason why it is not a sound one. Perhaps, all questions were new at one time. We dare say that when the chancellors first announced their jurisdiction to enforce specifically the performance of contracts and to reform written instruments eyebrows were lifted in the Inns of Court and the common law judges made wry faces. The Court of Appeals of New York in *Kujek* v. *Goldman*, (1896) 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 A. S. R. 670, say:

> "While no precedent is cited for such an action, it does not follow that there is no remedy for the wrong, because every form of action when brought for the first time must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there had never been an occasion to make one."

The proposition is simply this. Florida was not one of the original thirteen states. Its admittance to the Union was authorized by an Act of Congress of July 7, 1838.[15]

Section 3 of the Act specifically provided for an election to be held "to devise and adopt proper means for the formation and establishment of an independent state government for the people of Florida and to form a bill of rights and constitution for the same."[16]

Section 9 provided that on the adoption of a constitution the convention should transmit an authenticated copy to the President of the United Sates, to the presiding officers of both Houses of Congress, and to the delegates from Florida, and *"if the same be ratified and approved by Congress,* the said state shall then be admitted into the Union upon an equal footing with the original states." The convention was duly held and the constitution was adopted. It contained a bill of rights consisting of twenty-seven sections. Section 6 provided:

> "That the right of trial by jury shall *for ever* remain inviolate."

Sections 10 and 15 also referred to trials by jury specifically and in terms, and other sections provided for pub-

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[15]This Act authorized the inhabitants of the territory to form a constitution and state government and to assume such name as they deemed proper, "and the said state, *when formed in the manner hereinafter provided,* shall be admitted into the Union upon an equal footing with the original states in all respects whatsoever, provided that the constitution and state government so to be formed shall be republican and in conformity to the principles contained in the Constitution of the United States."

[16]It will be noted that "bill of rights" was mentioned before "constitution."

lic trials, the right to have counsel, be confronted by the witnesses, compulsory process, etc., in accordance with bills of rights in effect, without exception as far as we know, in every state.

The constitution so formed was approved by the Act of Congress of March 3, 1845. It was found to be republican in form and Florida and Iowa were admitted into the Union.

It is safe to say that the Florida Convention would never have adopted a constitution without a guaranty of jury trial, and the Congress of the United States would never have approved such an instrument if it had, nor would it have authorized the admittance of Florida into the Union.

Instead of quoting from emphatic statements of this Court how jealously this right is guarded, we earnestly ask the Court to refer to its decision in the following cases:

Patton v. *United States,* (1930) 281 U. S. 276;
Glasser v. *United States,* (1942) 315 U. S. 60;
Jacob v. *City of New York,* (1942) 315 U. S. 752;

and the dissenting opinion of Mr. Justice Black (concurred in by Mr. Justice Douglas and Mr. Justice Murphy) in *Galloway* v. *United States,* (1943) 319 U. S. 372, 396, in support of our position that the guaranty and preservation *for ever* of the right of trial by jury was a condition upon which Florida was admitted to the Union and a breach of it violates a Federal right. Mr. Justice Black pointed out that Hamilton's view was that a jury verdict should be reexamined, if at all, only by a second jury, and yet the Florida Court, after deliberately and point-blank holding that the plaintiff's evidence made out a case that entitled him to go to the jury, calmly tossed two jury verdicts out of the window.

This Court reversed the judgment of the Supreme Court of Missouri for doing this identical thing. *Lavender* v. *Kurn*, (1946) 327 U. S. 645.

This decision was called to the attention of the Florida Court but it paid it no more heed than it would have the judgment of a Hottentot tribe.

That petitioner did not receive a fair trial in the Florida Supreme Court is demonstrably clear. That this Court is his only hope of getting justice is not less clear.

Respectfully,

ROBERT H. ANDERSON,
HARRY T. GRAY,
Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

NO. 737

JAMES YATES, Petitioner,

vs.

EDWARD BALL, Respondent.

BRIEF OF RESPONDENT

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

HENRY P. ADAIR,
Barnett National Bank Building
Jacksonville, Florida

WM. H. ROGERS,
Consolidated Building
Jacksonville, Florida

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In the
Supreme Court of the United States

OCTOBER TERM, 1949

NO. 737

JAMES YATES, Petitioner,

vs.

EDWARD BALL, Respondent.

BRIEF OF RESPONDENT

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

STATEMENT OF THE MATTER INVOLVED

This case first appears in the reports, in *Yates* v. *Ball*, 132 Fla. 132, 181 So. 341. The opinion discloses that there had been a trial in the Circuit Court, at which a verdict for Respondent was directed at the close of Petitioner's evidence. Petitioner appealed. In reversing the Circuit Court,

the Florida Supreme Court held that Petitioner's evidence, standing alone, made a prima facie case, thus requiring Respondent to put on his evidence.[1]

Thus far no federal question appears.

At the *second* trial, the evidence of *both* parties was put on.[2] The Circuit Court denied Respondent's motion for a directed verdict after all the evidence was in. There was a verdict for Petitioner; and Respondent appealed. The Supreme Court again reversed the Circuit Court. *Ball* v. *Yates,* 145 Fla. 537, 200 So. 692. In its opinion, the Supreme Court noticed that on the prior appeal Petitioner's evidence *only* had been before the Court, but that on this the *second* appeal the evidence of *both* parties was before the Court for the *first time.* The opinion referred to the former decision (based solely on Petitioner's evidence) and then went on to hold that, "with the picture of the transaction now complete" the evidence was legally insufficient to support a verdict for Petitioner.

Still no federal question appears in the case.

---

[1] It is not true (as the Petition for Certiorari asserts, pp. 1-2) that Respondent "was buying" the lands covered by Petitioner's second mortgage. The record does *not* support Petitioner's assertion.

Nor is it correct to say (as the Petition for Certiorari does, p. 2) that, in *Yates* v. *St. Johns Beach Development Co.,* 118 Fla. 788, 160 So. 197, the Florida Supreme Court "squarely held that the oral contract was not a promise to pay the debt of another within the statute of frauds." What the Supreme Court did hold, in *Yates* v. *St. Johns Beach Development Co.,* was that, in an equity suit for specific performance where part performance was alleged, the statute of frauds *did not apply.* However, in the subsequent action at law for damages for alleged breach of contract (the case at bar) the Supreme Court held that the Florida statute of frauds *did apply. Ball* v. *Yates,* 158 Fla. 521, 29 So. 2d 729.

[2] It is not true (as the Petition for Certiorari asserts, p. 2) that Respondent's evidence "consisted principally of a denial of the authority of the agent who acted for him (the Respondent) in making the contract." The record does not support Petitioner's assertion. On the contrary, as the subsequent decisions of the Florida Supreme Court in this case show (145 Fla. 537, 200 So. 692, 158 Fla. 521, 29 So. 2d 729), Respondent's evidence consisted *principally* of conclusive refutation of all possible inferences of (i) agency, (ii) ratification, and (iii) meeting of the minds of the parties.

Following the *second* appeal, Petitioner amended the details of his declaration and Respondent pleaded over. Petitioner again put on the same evidence. Respondent's evidence, although greatly strengthened, was to the same legal effect. The trial judge erroneously denied Respondent's motion for a directed verdict after the evidence was in. There was a verdict for Petitioner; and Respondent appealed.

For the third time, the Supreme Court reversed the trial court. *Ball* v. *Yates,* 158 Fla. 521, 29 So. 2d 729. This time the Supreme Court wrote a lengthy opinion and blue-printed with precision the further proceedings to be had in the case. The Supreme Court held that the trial court had "erred in not directing a verdict for the defendant (Respondent) after all the evidence was in." It specified four separate grounds for its decision, viz:

(1) That the evidence in its entirety was legally insufficient to establish (a) that the purported agent was the authorized agent of Respondent, or (b) that Respondent had ever ratified the purported agency.

(2) That the evidence was legally insufficient to establish either (a) a contract duly made between the parties or (b) subsequent ratification of an unauthorized promise, or (c) any meeting of the minds of the parties whatever.

(3) That the alleged oral promise of Respondent to Petitioner was in contravention of the Florida Statute of Frauds and, therefore, unenforceable in an action at law for damages.

(4) And that, under the doctrine of the law of the case, the *third* appeal was ruled by the *second* appeal (145 Fla.

537, 200 So. 692) where the Supreme Court had held unanimously that the evidence in its entirety was legally insufficient to make a case for Petitioner.

Still no federal question appears in the case.

In conclusion, the Supreme Court directed the trial court to conduct a pre-trial conference and determine whether Petitioner had any new evidence which might make a case for a jury trial, and if not, then to "so adjudge and enter a judgment for the defendant" (Respondent).

Still no federal question appears in the case.

A petition for rehearing of the Supreme Court's decision on the *third* appeal was filed and denied. The petition for rehearing claimed, inter alia, that the holding of the Supreme Court to the effect that the "complete" evidence failed (on four grounds) to make a case for the jury, and directing the trial court, upon a pre-trial conference, to ascertain whether Petitioner could muster (on a *fourth* trial) any new evidence (to make a case for the jury) violated Petitioner's Federal Constitutional rights, viz: (a) denied him due process of law under the 5th and 14th Amendments; (b) denied him equal protection of the laws under the 14th Amendment; and (c) denied him the right to a jury trial under the 7th Amendment.

These claims are not even colorable, unless it is thought that state court decisions, holding that evidence is legally insufficient as a matter of state law to make a case, infringes the Federal Constitution.

Pending the decision of the petition for rehearing, a belated suggestion was filed by Petitioner for the disqualifica-

tion of Justices Buford and Adams on the ground of bias and prejudice. The two justices disavowed bias and prejudice, but submitted the question to the Court itself, which unanimously held them duly qualified (Justices Buford and Adams not participating). 158 Fla. text 530-537, 29 So. 2d, text 733-737.

Thereupon, Petitioner filed in this Court his petition for writ of certiorari to the Supreme Court of Florida, No. 156, October Term, 1947. The petition for certiorari claimed (i) that the supposed disqualification of two of the seven justices of the Florida court for bias and prejudice (despite the fact that the remaining five justices of the Florida Court unanimously held the two justices not disqualified, 158 Fla. text 530-537, 29 So. 2d, text 733-737) denied Petitioner due process and equal protection in violation of the 14th Amendment, and (ii) that the decision of the Florida court, holding that as a matter of state law the evidence in the case was legally insufficient to make a jury case, denied Petitioner the right to a jury trial under the 7th Amendment (aided by the 14th Amendment).

On October 13, 1947, this Court denied said petition on the merits.[3] 332 U. S. 774, 92 L. ed. 359.

Following this Court's decision of October 13, 1947, 332 U. S. 774, 92 L. ed. 359, denying said petition for certiorari, the mandate of the Supreme Court issued to the Circuit

[3] Although doubt existed as to the *finality* of the decision of the Florida Supreme Court of Nov. 29, 1946 (158 Fla. 521, 29 So. 2d 729) Petitioner set all doubt at rest by his self-styled "final and binding stipulation" of finality, contained in his reply brief (page 2) filed here. And this Court, presumably accepting Petitioner at his word, refrained from denying his petition "for want of a final judgment" and denied his petition on the merits.

Court (R. 1-9). A pre-trial conference was held pursuant to the directions of the Supreme Court (R. 9-66).[4]

At the pre-trial conference, Petitioner first claimed that the procedure violated the Florida Constitution (R. 14). Next he claimed (R. 59-60) that the procedure was "unorthodox, unauthorized by law, contrary to law and violative of Petitioner's constitutional rights, especially his right to proceed unimpeded to have another trial of this case before a jury." Petitioner did not *specially* claim any right under the *Federal* Constitution.

Still no federal question appears in the case.

Upon the showing made by Petitioner at the pre-trial conference (R. 9-66), the Circuit Court found that "the evidence to be adduced upon a further trial in this cause as shown by plaintiff's aforesaid response and supplemental response to the aforesaid rule nisi will be substantially the same in legal effect as that submitted at the trial as reviewed by the Florida Supreme Court in its opinion and decision of November 29, 1946," and entered final judgment for Respondent (R. 67-70).

Petitioner again appealed to the Florida Supreme Court. His assignments of error in the Supreme Court questioned (i) the correctness of the trial judge's legal appraisal of the evidence, and (ii) the entry of a summary judgment for Respondent, rather than conducting a formal trial (R. 71).

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[4] The record of the pre-trial conference consists of: (a) Motion by Respondent for order to show cause (R. 9-12); Order to show cause (R. 13); Affidavit (R. 58-59); Supplemental Response of Petitioner (R. 59-63); Motion of Petitioner to set cause for trial (R. 63) and Motion of Respondent for entry of judgment for Respondent (R. 63-66).

Petitioner did not *specially* claim that the conduct of the pre-trial conference and entry of a summary judgment violated the 7th Amendment.

Still no federal question appears in the case.

Pending the *fourth* appeal, Petitioner filed in the Supreme Court his petition to recall the mandate of that court which had issued more than two years before upon the *third* appeal, following this Court's judgment of Oct. 13, 1947, 322 U. S. 774, 92 L. ed. 359. This petition sought also to have the Supreme Court vacate its decision of Nov. 29, 1946, 158 Fla. 521, 29 So. 2d 729, and, in lieu thereof, affirm the judgment of the Circuit Court of March 8, 1945. In this petition, Petitioner renewed his contention of the supposed disqualification of two of the justices who had participated in that decision, and again controverted the correctness of that decision as a matter of state law (R. 86-96). Petitioner did not specially claim any right under the Federal Constitution.

Thereupon, Respondent replied to said petition and moved to dismiss same (R. 97-102).

On July 26, 1949, the Supreme Court denied Petitioner's petition to recall its mandate of November 28, 1947, and to affirm the Circuit Court's judgment of March 8, 1945 (R. 102).

On the same day, by a per curiam decision, the Supreme Court affirmed the judgment of the Circuit Court of June 15, 1948 (R. 102).

On this the *fourth* appeal, three justices who had concurred in the *third* decision, viz: Justices Buford, Adams

and Brown, did not participate. They had been replaced by Justice Hobson and Associate Justices Taylor and Gillis. Thus the question of disqualification of Justices Buford and Adams on the *third* appeal was rendered moot by a *fourth* decision of the Supreme Court, to the same effect, but with different personnel, which included neither Justice Buford nor Justice Adams (post pp. 47-49).

A petition for rehearing was filed, September 7, 1949, and denied, January 13, 1950 (R. 103-111). This petition merely quarreled about the correctness of the decision of the Supreme Court as a matter of state law, making no special claim of violation of any right under the Federal Constitution.

It is thus apparent, without the necessity of any argument whatever, that the face of the record itself discloses:

(1) That *all* questions concerning the disqualification of Justices Buford and Adams on the *third* appeal were rendered *moot* by the Supreme Court's two subsequent decisions (to the same effect) on the *fourth* appeal, in which those two justices *did not participate* (R. 102, ..., Fla. ....., 44 So. 2d 302).

(2) That no question whatever exists of any constitutional right to a jury trial, because the record discloses that the Florida Supreme Court, in its last *three* successive decisions (145 Fla. 537, 200 So. 692; 158 Fla. 521, 29 So. 2d, 729; ..... Fla. ....., 44 So. 2d, 302) has uniformly held as a matter of *state* law that the evidence in its entirety is legally insufficient to make a case to go to a jury.

PETITIONER'S JURISDICTIONAL STATEMENT

The petition for certiorari (p. 6) states merely that this Court has jurisdiction to review the judgment in question, under Section 1257 of the Judicial Code, because, it is said, it is a judgment

> "where a right, privilege or immunity was specially set up and claimed by the petitioner under the Constitution as (a) a denial of due process of law and of equal protection of the laws; (b) a denial of the right of trial by jury secured under the seventh amendment; (c) a denial of the right of trial by jury secured under the Florida Constitution; and (d) obstructing justice under the Civil Rights Act."

Petitioner's jurisdictional statement, quoted above, fails to comply with the rules of this Court in that it wholly fails (as Rules 38 and 12 require) to

> "specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them * * *; and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears * * *, as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court."

Nor does Petitioner's brief in support of his petition for certiorari cure his disregard of the rules in his petition. Nowhere in his brief does he specify (i) how, when or where he raised any federal questions in the state courts or (ii) how they were passed upon or (iii) the record references to

support his claim of jurisdiction.[5] And although Petitioner's brief is replete with factual assertions (many of them wholly unsupported by the record and many of them contrary to the record) he nowhere in his brief gives specific record references to justify his statements.

Wherefore, the petition for certiorari should be summarily denied.

QUESTIONS PRESENTED AND REASONS RELIED ON BY PETITIONER

There are two additional "sufficient reasons" for the summary denial of the Petition. They are as follows:

I. The Review Sought By The Present Petition Was Sought By The Former Petition (No. 156, October Term, 1947), And Was Denied By This Court.

While this petition nominally seeks to review the *fourth* decision of the Florida Supreme Court (44 So. 2d 302), the truth is that all of Petitioner's "Questions Presented" (Pet. pp. 6-8), and all of his "Reasons Relied On" (Pet. pp. 8-9), are bottomed upon the *third* decision of that Court (158 Fla. 530, 29 So. 2d, 733). The review of that *third* decision was what was sought by the former petition for certiorari (No. 156, October Term, 1947). Every matter of substance comprehended in the present petition was expressly or implicitly comprehended in the said former petition to this Court (ante, p. 5-8). On October 13, 1947, this Court denied the former petition on the merits, 332 U. S. 774, 92 L. ed. 359 (ante, p. 5, Note 3).

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[5] Moreover, a critical examination of the record here shows no substantial Federal question "specially set up or claimed in the lower courts, as required by Section 1257 of the Judicial Code and the decisions of this Court.

The denial of said former petition is "sufficient reason" for denying the present petition.

II. The Petition And Supporting Brief Violate Rule 12, Par. 1 And Rule 38, Par. 2 Of The Rules Of This Court.

The present petition brings to this Court *no* Record, except the Record on the *fourth* appeal in the Florida Supreme Court. The Record on the first *three* appeals in that Court were brought to this Court with the former petition (No. 156, October Term, 1947[6]).

The present petition (pp. 1-7, including all five of the Questions Presented by the Petitioner) and the supporting brief thereof (pp. 1-28), are bottomed upon the Records on the *first*[7], *second*[8] and *third*[9] appeals (which were brought here with the former petition). *But neither the present petition nor the brief in support thereof contains a single record page reference to the Record brought here with the former petition.* Petitioner thus violates the mandate of the Rules of this Court (Rule 12, par. 1, and Rule 38, par. 2), and adds greatly to the burdens of this Court, as well as the burdens of the Respondent.[10]

Petitioner's failure to comply with the requirements of the foregoing Rules of this Court, is a sufficient reason for denying the present petition (Rule 38, par. 2).

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[6] *Yates* vs. *Ball*, 332 U. S. 774, 92 L. Ed. 359. In no way has the Petitioner made the Record brought here with the former petition a part of the Record upon the present petition.
[7] 132 Fla. 132, 181 So. 341.
[8] 145 Fla. 537, 200 So. 701.
[9] 158 Fla. 521, 29 So. 2d 729.
[10] Particularly is that true because many, if not most, of the statements made by the Petitioner with respect to the former Record are utterly unsupported by that Record.

We now turn to the discussion of the Questions Presented by the present petition.

ARGUMENT

POINTS I, IV and V.

Petitioner's Question 1 (Pet. p. 5) deals with the "law of the case" in relation to the due process and equal protection clauses; his Question 4 (Pet. p. 5) deals with the alleged disqualification of Justices Buford and Adams, in relation to the due process clause. His Question 5 (Pet. p. 6) deals with the Civil Rights Act (Title 8, Section 47(2), U. S. Code).

Petitioner has dealt with these three questions under a single topic in his brief, titled "Denial of Due Process—Civil Rights" (Pet. Bf., pp. 1-21, inclusive). We shall follow the same course in this brief, as nearly as it is practicable to do so.

POINT I.

The Evidence Before The State Court On The Second And Third Appeals Was Substantially Different From The Evidence On The First Appeal, But If The Evidence Had Been The Same, The State Court Might Hold On The Second And Third Appeals, Notwithstanding The Due Process And Equal Protection Clauses, That The Evidence Was Insufficient To Establish A Cause Of Action And Order The Plaintiff Non-Suited.

Petitioner's first question (Pet. p. 6) argued in Petitioner's Supporting Brief at pages 3-12[11], is based upon false assumptions.

Petitioner asserts both in the petition (Pet. p. 7) and in his brief, that the evidence on the *second* and *third* appeals is "the same evidence" as that on the *first* appeal. That is not *true*. The Record on this petition (seeking to review the decision on the *fourth* appeal) does not support the assertion that the decisions on the *second* and *third* appeals were on "the same evidence" as that on the *first* appeal. Nor does the Record on the former petition for certiorari No. 156, October Term, 1947[12] support Petitioner's assertion.

But it is not necessary to rely on Petitioner's failure to bring here and point out the essential support for his fundamental assertion, although this is his burden under this Court's decisions and rules. For the *second* and *third* decisions of the Florida Supreme Court, of which the Petitioner (for a second time) here complains, both hold that Petitioner's assertion is unwarranted. From those decisions, and from the Record upon the former petition, we shall show:

(i) That the evidence before the State Court on the *second* and *third* appeals was not the same as the evidence before that Court on the *first* appeal; so that the decision on the *first* appeal did not become the law of the case, and

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[11] The first two and one-half pages of Petitioner's Supporting Brief (pp. 1-3) bears no relation whatever to Plaintiff's First Question (Pet. p. 6). They are confined almost wholly to statements of Petitioner's suspicions and innuendos, and insofar as they are pertinent at all, relate wholly to Petitioner's Question 4 (Pet. p .7), claiming the disqualification of certain of the State Court Justices.

[12] The record on the former petition is referred to as "Former R." in the subsequent pages of this Brief.

(ii) That the State Court, upon the *second* and *third* appeals did not depart from the law of the case, and thus (sic) offend against the due process clause of the 14th Amendment.

The foregoing conclusions are warranted for the following reasons:

(a) The evidence before the State Court on the *second* appeal was substantially different from the evidence on the *first*.

(b) On the *third* appeal, Respondent's case was stronger, but the evidence as a whole was the same in legal effect as it had been upon the *second* appeal.

(c) The decision on the *first* appeal was not the "law of the case" upon the *second* and *third* appeals, since the evidence upon the *second* appeal (and upon the *third* appeal also) was substantially different from the evidence on the *first* appeal.

(d) The 14th Amendment of the Federal Constitution does not preclude a State Court from modifying its views while a case remains pending.

(e) Decisions by State Courts of state law are conclusive and binding on the Federal Courts, regardless of whether they are rightly or erroneously decided by the State Court.

We now deal with these seriatim.

A. The Evidence Before The State Court On The Second Appeal Was Substantially Different From The Evidence On The First.

On the *first* appeal,[18] the Supreme Court's opinion discloses that the trial court had directed a verdict for Re-

[18] *Yates* v. *Ball*, 132 Fla. 132, 181 So. 341.

spondent *at the close of Petitioner's evidence.* In reversing the trial court, the Florida Supreme Court held that Petitioner's evidence, standing alone, made a prima facie case, thus requiring the Respondent to put on his evidence.

On the *second* appeal[14], the Supreme Court's opinion discloses that following the decision on the *first* appeal, the trial court

> "conducted an extensive trial at which there was offered voluminous testimony on the part of the respective litigants"

resulting in a verdict for Petitioner. The Supreme Court then went on to hold that "With the picture of the transaction now complete", it found the evidence legally insufficient to support a verdict for Petitioner.

And so the case was reversed, with leave to Petitioner to amend his declaration, if so advised.

Petitioner asserts that on the *second* trial, Respondent's evidence consisted principally of a denial of the authority of the alleged agent of Respondent (Pet. Bf. p. 4). That assertion is unwarranted and untrue, as is shown by the Record on the former petition for certiorari (No. 156, October Term 1947, Former R. pp. 447-647), and Defendant's Exhibits A to N, inclusive. That such evidence consisted *principally* of conclusive refutations of all possible inferences of: (i) Agency; (ii) Ratification; (iii) Meeting of the minds of the parties, is borne out by the opinion of the Florida Supreme Court upon the *third* appeal, which we shall now consider.

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[14] *Ball* v. *Yates,* 145 Fla. 537, 200 So. 692.

B. On The Third Appeal, Respondent's Case Was Stronger But The Evidence As A Whole Was The Same In Legal Effect As It Had Been On The Second Appeal.

After the coming down of the mandate on the *second* appeal, Petitioner amended his declaration, and Respondent pleaded over. Although Respondent's evidence was greatly strengthened, the evidence as a whole was to the same legal effect as on the *second* trial. The trial court again declined to direct a verdict for Respondent, and the verdict of the jury was for Petitioner, and Respondent again appealed. The Florida Supreme Court, on that *third* appeal, held that:

> "We find that the trial court erred in not directing a verdict for the defendant, after all of the evidence was in." 158 Fla. Text 529, 29 So. 2d Text 733.

The four grounds put forward by the Florida Supreme Court in support of its said conclusions are summarized ante, pp. 3-4.

Petitioner concedes, as he must (Pet. p. 3, Pet. Bf. p. 5, Note 1) that the *third* opinion of the Florida Supreme Court construed the opinion on the *second* appeal to hold that the evidence was insufficient to support a verdict, and was intended to dispose of the case.[15] Petitioner takes violent issue with that finding of the *third* decision, and proceeds at length in his brief (pp. 5-8) to denounce the (sic) "Flagrant Character of Third Decision".

We answer that argument in our next sub-topic.

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[15] 158 Fla. 521, 29 So. 2d 729.

C. The Decision On The First Appeal Was Not The Law Of The Case Upon The Second And Third Appeals Because The Evidence Upon The Second Appeal (And Upon The Third Appeal Also) Was Substantially Different From The Evidence On The First Appeal.

In his petition for rehearing on the *third* appeal (R. 58) Petitioner asserted (as he does here), that the decision on the *first* appeal became "the law of the case", and was binding on the court, as well as on the parties, citing the authorities cited here (Pet. Bf. pp. 7-8) and more.

In the opinion denying the petition for rehearing[16] on the *third* appeal, the Florida Supreme Court declared that the decision on the *first* appeal was not the law of the case upon the *second* appeal, because the evidence upon the *second* appeal (when the evidence of both parties was in), was materially different from the evidence on the *first* appeal (when only Petitioner's evidence was in). And that because the evidence on the *third* trial was not materially different from that on the *second* trial, the law of the case, as announced on the *second* appeal, was properly applied in the decision on the *third* appeal.

But the truth is that this Court is not concerned with the problem (if any there be) of whether the evidence was different on the *second* and *third* appeals from the evidence on the *first,* or as to which of the *three* decisions fixed the "law of the case". This we now show.

D. The 14th Amendment Of The Federal Constitution Does Not Preclude A State Court From Modifying Its Views While A Case Remains Pending.

[16] *Ball* v. *Yates,* 158 Fla. 521, text 537, 29 So. 2d 729, text 737.

The principle stated in the foregoing sub-title is sustained by an unbroken line of the decisions of this Court,[17] and this Court has held time after time that state courts may overrule their own prior decisions without violating the Federal Constitution.[18]

E. Decisions By State Courts Of State Law Are Conclusive And Binding On The Federal Courts, Regardless Of Whether They Are Rightly Or Erroneously Decided By The State Court.

Notwithstanding the unwarranted statements in his brief relating to Petitioner's First Question (Pet. Bf. p. 3-12), Petitioner discloses that the decisions of which he is aggrieved, are pure legal questions, governed by the State law; and this Court has long since established that decisions by State Courts of state law are conclusive and binding on Federal Courts, including this Court.[19]

Not only that, but this Court has repeatedly held that erroneous decisions by State Courts of state law do not contravene the 14th Amendment.[20]

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[17] *King* v. *West Virginia*, 216 U. S. 92, 54 L. ed. 396; *Lawers & Cooke* v. *Atcherly*, 222 U. S. 285, 56 L. ed. 202; *Messinger* v. *Anderson*, 225 U. S. 436, 56 L. ed. 1152; *Moss* v. *Romey*, 239 U. S. 539, 60 L. ed. 425; *Rooker* v. *Fidelity Trust Co.* 261 U. S. 114, 67 L. ed. 556.

[18] *Backus* v. *Fort Street Union Depot*, 169 U. S. 557, 42 L. ed. 853; *Patterson* v. *Colorado*, 205 U. S. 454, 51 L. ed. 879; *Tidal Oil Co.* v. *Flanagan* 263 U. S. 444, 68 L. ed. 382; *Brinkerhoff-Faris Trust & Savings Co.* v. *Walter O. Hill*, 281 U. S. 673; *Cross Lake Shooting and Fishing Club* v. *State of Louisiana*, 224 U. S. 632, 56 L. ed. 924.

[19] *Highland Farms Diary* v. *Agnew* (1937) 300 U. S. 608, 81 L. ed. 835; *Erie Railroad Company* v. *Harry J. Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

[20] *Bonner* v. *Gorman*, 213 U. S. 86, 53 L. ed. 639; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. ed. 91; *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 30 L. ed. 243; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 56 L. ed. 760; *Kryger* v. *Wilson*, 242 U. S. 171, 61 L. ed. 229; *Milwaukee E. R. & L. Co.* v. *Wisconsin*, 252 U. S. 100, 64 L. ed. 476; *Worcester County Tr. Co.* v. *Riley*, 302 U. S. 292, 82 L. ed. 268.

POINT IV.

The Participation of Justices Buford And Adams In The Third Decision Of The Case Did Not Deny The Petitioner Due Process Of Law In Violation Of The 14th Amendment.

Petitioner's Fourth Question (Pet. p. 7) presented at pp. 1-3 and pp. 12-21 of Petitioner's supporting brief, is that due process of law insures him a fair trial by an impartial court, and that he is denied due process when it is shown and two (of the seven) judges of the State Court "had financial transactions with his adversary" of such a nature and magnitude as to justify the litigant's fear of their impartiality, especially so (sic) when the majority required to reverse his judgment necessarily included the challenged judges.

There are two answers to Petitioner's fourth question, each complete in and of itself; they are:

(i) The record shows that the participation of the challenged justices did not deny Petitioner due process.

(ii) The question of their disqualification on the *third* appeal was rendered moot by the *fourth* decision of the Florida Supreme Court to the same effect, but with different personnel, which included neither Justice Buford nor Justice Adams.

We now discuss these two answers seriatim.

I. The Participation Of The Challenged Justices Did Not Deny Petitioner Due Process.

Their participation did not deny Petitioner due process, because:

(a) The record on the disqualification proceedings discloses no bias.

(b) The decision of the Florida Supreme Court adjudged that Justices Buford and Adams were not disqualified for bias should be conclusive.

(c) The suggestion of disqualification came too late.

(d) The decision of the Florida Supreme Court is a valid judgment.

(e) The judgment of the Florida Supreme Court does not deny Petitioner due process of law.

This we shall show, first setting out some of the inaccurate statements of the petition and brief on this subject.

A Catalogue Of The Major Inaccuracies Of The Petition And Supporting Brief.

The sole reliance of the Petitioner in the *petition for certiorari* upon the disqualification of Justices Buford and Adams is his suggestion of disqualification filed in the former proceedings for *certiorari* in this Court (No. 156, October Term, 1947, Former R. 831-902, Pet. pp. 3-4). But Petitioner, in his current supporting brief (pp. 1-3) goes beyond the confines of the petition. He says that when the *second* unanimous decision came down it became obvious that "sinister influences" were at work in this case (Pet. Bf. p. 1); that this is so because the Court gave no understandable reason for reversing the second judgment (Pet. Bf. p. 2). He declares that "As time passed indications of insidious activity accumulated"; that strange rulings were made; that the case was advanced on the calendar; that one of the

concurring judges resigned the next day after the decision was rendered, under the retirement act; and that that Justice had been eligible for retirement for more than a year (doubtless, meaning Justice Brown, retired). Petitioner goes on to say (p. 2) that he and his counsel had suspected for some time that the court did not function as a *"free agent"*, and that after the *third* decision—"totally inexplicable on the basis of honest, unprejudiced judicial consideration having due regard for established precedents"—he became convinced that something was wrong (Pet. Bf. p. 2).

There is not a single reference to the transcript, either upon the former petition for certiorari (No. 156, October Term, 1947) or upon the current transcript, to sustain any of the charges and innuendoes to which we have referred. And we assert without qualification that there is nothing in either of the records to sustain them. They are figments of Petitioner's morbid imagination.

Petitioner nowhere has suggested that either of the two judges whose impartiality is questioned, has any interest of any kind, direct or indirect, proximate or remote, in the outcome of the controversy between Petitioner Yates and Respondent Ball.[21]

The gravamen of Petitioner's imputation is that "financial transactions with the litigant's adversary" by two of the seven justices, so affected their "impartiality" as to deprive

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[21] On the former petition for certiorari filed by Petitioner in this Court (No. 156, October term, 1947), at page 15 of his Brief, Petitioner declared:

"Here, Petitioner is faced, not with a bribe, but with financial transactions which cast doubt upon the disinterestedness of the two judges concerned. Conceding their honesty and their desire to mete even-handed justice, their relation with the litigant and his interest was such as to make doubtful their ability to do so."

The same Suggestion of Disqualification was involved on the former petition as is now involved upon this one.

the court's decision against him (by a majority of the other five justices) of due process of law (Pet. 7 and Pet. Bf. pp. 3, 14), is at variance with the Record. The Record does not show that either of the two justices has ever engaged in financial transactions with Respondent Ball.

Petitioner's Suggestion of Disqualification (Former R. 830-902) shows:

(1) That Respondent Ball is one of the four trustees of the Alfred I. duPont estate (Former R. 833).[22]

(2) That the duPont estate (of which Ball is one of the four trustees) owns and controls a group of eighteen banks, including the Florida National Bank of Jacksonville and the Florida Bank at Fort Pierce, and also the St. Joe Paper Company (Former R. 833).[23]

(3) That Ball is one of twenty-one directors of the Florida National Bank of Jacksonville (Former R. 856) and is President of St. Joe Paper Company, but that Ball is not an officer of the Florida National Bank of Jacksonville (Former R. 856) and is neither an officer nor a director of the Florida Bank at Fort Pierce (Former R. 874).

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[22] The bare opinion of the affiant is advanced (Former R. 833) that Ball "is the dominating and controlling trustee". But that assertion is wholly unsupported by any factual averment, or any showing of the powers and duties of the respective trustees. And it is nowhere asserted that Respondent Ball has any personal or financial interest, directly or indirectly, in the trust assets or income.

[23] It is nowhere asserted that Respondent Ball has any personal or financial interest, directly or indirectly in the Florida National Bank of Jacksonville, or the Florida Bank at Fort Pierce. He owned 4.4 percent of the shares of stock of St. Joe Paper Company (R. 99).

(4) That in April 1944, St. Joe Paper Company made an oil lease to Justice Buford.[24] Ball signed it jointly with another corporate officer on behalf of the Company. This lease has been a matter of public record since August, 1944 (Former R. 887).[25]

(5) That on June 29, 1945, Justice Adams and his wife borrowed $80,000.00 from the Florida National Bank of Jacksonville[26] and gave a mortgage securing it, covering more than 22,000 acres of land, 200 head of Hereford cattle, and a large amount of automotive and farm equipment (Former R. 887-893). This mortgage has been a matter of public record since July 3, 1945 (Former R. 842, 843). The mortgage was paid off and satisfied of record January 10, 1946 (Former R. 843 and 940), approximately ten months before the case was argued and submitted in the Florida Supreme Court.

(6) That on December 4, 1946, after the Florida Supreme Court's decision had been rendered, Justice Adams and Irlo Bronson borrowed $30,000.00 from the Florida Bank at Fort Pierce and gave as security a mortgage covering improved property. The buildings on the property were required by the mortgage to be insured for $30,000.00, the

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[24] The case was not tried in the Circuit Court until nearly a year afterward (R. 168). Justice Buford's acknowledgment of the assignment (Former R. 930) of this oil lease was taken by the Clerk of the Supreme Court of Florida.

[25] It was charged in the Suggestion of Disqualification (Former R. 839) "upon information and belief" that, during the pendency of the second appeal in this case, Ball had employed an attorney by the name of Harry Wells, said to be an intimate friend of Justice Buford. It was not charged that Wells had anything to do with this case. What service, if any, Wells performed for Ball, was not stated, but this much Petitioner concedes: That upon taking the appeal Ball did not employ an intimate friend of one of the Justices to appear as counsel of record in the case upon the appeal.

[26] Motion for new trial of the case was then pending undecided in the Circuit Court.

entire amount of the mortgage (R. 900).[27] This mortgage has been a matter of public record since December 10, 1946 (R. 844-901).[28]

These facts disclose three legitimate business transactions (at all times, matters of public record), the one, a lease to Justice Buford from St. Joe Paper Company, the other, two mortgage loans made by two banks to Justice Adams, et al.[29] Petitioner does not question their legality (Former R. 844-5). However, when Petitioner characterizes them (Pet. p. 7 and Pet. Bf. p. 14) as "financial transactions with his adversary", his statement is unwarranted. The record shows no transactions with the litigant, Ball. As one of two corporate officers, Ball signed the St. Joe Paper Company lease on behalf of the Company. And it is not shown to be a fact that he ever even knew of either of the two mortgage loans made by the two banks.

Before taking up the legal aspects of the facts above summarized, it is necessary to point out a number of Petitioner's other inaccuracies:

(1) At page 3 of Petitioner's brief he refers to St. Joe Paper Company as "Ball's principal holding company"; i. e., Ball's corporation. That is flatly contradictory of Petitioner's Suggestion of Disqualification which states categorically that that corporation is "the chief operating company of the duPont Estate" (Former R. 834).

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[27] Justice Adams' acknowledgment on this mortgage was taken by the Clerk of the Supreme Court.

[28] Without disclosing the source of the alleged information or the basis of the alleged belief, the affiant avers, "on information and belief" (Former R. 834) that loans by said banks of the size mentioned can be made only with Ball's approval. But it is not made to appear as a fact that Ball or the directors of the Florida National Bank of Jacksonville ever knew of the existence of either of these mortgages.

[29] These mortgages were "more than triply secured". 158 Fla. 521, 29 So. 2d text 737.

(2) At page 3 of Petitioner's brief he charged that the Florida National Bank of Jacksonville is "Ball's principal bank". Petitioner nowhere in his "Suggestion" charges that Ball had any "individual" interest in the Florida National Bank of Jacksonville or the Florida Bank at Fort Pierce or in the St. Joe Paper Company. On the contrary, the Suggestion (Former R. 833) charges that these banks are owned and controlled by the duPont Estate.

(3) At pages 4 and 3 of the petition and brief, Petitioner characterized the relationship between Justice Buford and St. Joe Paper Company under the oil lease, as "joint adventurers and profit-sharers". The lease (Former R. 880-887) clearly indicates otherwise; it is a typical lease calling for annual rentals.[30]

(4) At page 13 of his brief, Petitioner asserts that:

> "Two of the justices who sat in judgment on his (Petitioner's) case were already deeply committed to his opponent"

and at page 3 again misstates that:

> "The lengths to which the Supreme Court of Florida went in its decision on the third appeal of this case, in order to relieve from the burden of two jury verdicts the man with whom two of its members were financially involved, compel a somewhat more detailed review of the case than properly could be put in the petition for certiorari".

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[30] The Florida Supreme Court in its opinion overruling the Suggestion of Disqualification declared that "there was no joint or mutual interest" under the lease (158 Fla. text 521, 29 So. 2d text 734).

The statements quoted above and the innuendoes of them, are both unwarranted. The record nowhere shows that either Justice Buford or Justice Adams was ever "committed to" or "financially involved" with Respondent Ball.

(a) The oil lease from St. Joe Paper Company (Former R. 904-938), a duPont corporation (Former R. 834), to Justice Buford involved no obligation to Ball, not even an indirect obligation.

(b) The mortgage loan made by Justice Adams with the Florida National Bank of Jacksonville, another duPont corporation (Former R. 833), was not only "triply secured" but paid off nearly a year before this case was submitted to the Florida Supreme Court on oral argument. That involved no obligation to Ball of any kind.

(c) The mortgage loan made by Justice Adams with the Florida Bank at Fort Pierce, another duPont corporation (Former R. 833), also "triply secured", likewise involved no obligation to Ball in any way.

And so the truth of the matter is that nowhere is it shown that either of the justices has ever been under any commitment to Ball, financial or otherwise. And that the lengths to which the court went in the *third* decision, must have been due to its desire to decide *all* of the issues, and so to terminate this seemingly interminable litigation.

The minor premise of Petitioner's argument is, therefore, a false premise.

(5) After excoriating the court's opinion on the *third* appeal (Pet. Bf. pp. 7-10) because of its supposed departure from the "law of the case", which he asserts was established

on the *first* appeal, Petitioner concludes that (Pet. Bf. p. 10):

> "A thing like this (the *third* opinion) is shocking to the conscience. Ball's transactions with members of the Court offer the only explanation."

There is a fundamental fallacy in Petitioner's conclusion. To reach it he has cited the *first* decision of the case in October 1937; (132 Fla. 132, 181 So. 341) he has cited the *third* decision in November, 1946 (158 Fla. 521, 29 So. 2d 729). He then compares the holdings of the two decisions in parallel columns (Pet. Bf. pp. 6-8). But there are three vital factors significantly omitted by Petitioner and these demonstrate the fallacy of his conclusion:

(a) He omits to mention that the holdings quoted from the two opinions, and contrasted, are *not* based upon the same evidence. He would have this Court understand that the Florida Supreme Court changed its views because of supposed bias on the part of Justices Buford and Adams, whereas the truth is that the evidence on the first trial of the case had completely changed.[31]

(b) He challenges Justice Buford's disinterestedness because of the St. Joe Paper Company 1944 oil lease, but omits to state that Justice Buford's views have remained constant throughout the entire litigation. Justice Buford dissented on the *first* decision in 1937 (132 Fla. 132, 181 So. 341) when it was held, four to two, that plaintiff's evidence standing alone made a prima facie case. He maintained the very same view on the second decision in 1940 (145 Fla. 537, 200 So. 692) when the court's decision (holding that the

[31] Because the evidence had completely changed, there was no departure from the doctrine of the law of the case. *Ball* v. *Yates* 158 Fla. 521, 29 So. 2d 729.

complete evidence was legally insufficient to prove a case) was unanimous. And it is to be noted that both of these decisions were rendered years before the St. Joe Paper Company lease to Buford. Justice Buford maintained the same view on the *third* decision in 1946, and now it is Petitioner's conclusion, by fallacious *post hoc propter hoc* logic, that bias must have affected the third of his three identical decisions.

(c) Petitioner also omits to mention that on the *second* (the intermediate) decision in the case the Florida Supreme Court *unanimously* held that the complete evidence in the case was legally insufficient to support a verdict for Petitioner. That unanimous decision of the Florida Supreme Court was rendered years before the occurrences now supposed to disqualify Justices Buford and Adams. And the *third* decision merely reaffirmed that the *second* decision was "the law of the case", and that the alleged oral guaranty is in contravention of the Florida Statute of Frauds (158 Fla. 521, 29 So. 2d 729).

Therefore, it is unwarranted and absurd to conclude, as Petitioner does (Pet. Bf. p. 10) that the *third* decision of this case is "shocking to the conscience", or that "Ball's transactions with members of the Court" offer the "explanation" of it. On the contrary, the only sound conclusion which could be drawn from the three decisions of this case (the *first*, the *second*, and the *third* decisions) is that Petitioner had irretrievably lost his case on the *second* appeal in 1940 (when the Supreme Court unanimously held that the complete evidence failed to make a case. 145 Fla. 537, 200 So. 692). That decision (reaffirmed on the *third* ap-

peal[32]), was rendered years before the occurrences now supposed to disqualify two of the seven justices.

A. The Record On The Disqualification Proceedings Discloses No Bias.

Petitioner does not suggest that either of the two justices has or had any interest of any kind in the outcome of the suit. The sole ground with which we are concerned as to the attempted disqualification of the two justices is bias and prejudice.[33]

Stripped of its unwarranted innuendoes[34] the petition plainly shows on its face that neither Justice Buford nor Justice Adams was disqualified and that the Florida Supreme Court could have reached no other conclusion upon that question than the one that it did reach.[35]

We now summarize briefly all the pertinent facts alleged.

As to Justice Buford

The oil lease (Former R. 880) between St. Joe Paper Company and Justice Buford in 1944 was made:

(a) more than 3 years after the second reversal and remanding of this case by the Florida Supreme Court on the *second* appeal, and

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[32] And now again reaffirmed by the *fourth* decision, in which neither of the challenged justices participated (..... Fla. ....., 44 So. 2d 302, July 26, 1949).

[33] The Supreme Court of Florida so found (158 Fla. 521, 29 So. 2d text 734).

[34] Facts, not baseless conclusions, must be shown to warrant the disqualification of a judge for bias and prejudice. *Beland* vs. *United States*, 117 Fed. (2d) 958 (CCA-5), 1941, certiorari denied, 313 U. S. 585, 61 S. Ct. 1110, 85 L. ed. 1541, Rehearing denied, 314 U. S. 708, 62 S. Ct. 54, 86 L. ed. 1565.

[35] It is obvious that the "Suggestion" is insufficient on its face. However, since the petition and Supporting Brief (pp. 5, 12) rely upon the statements filed by the two Justices (29 So. 2d 735-737) we shall make reference to them in this sub-topic for the purposes of clarification.

(b) when the case was pending in the Circuit Court, and more than a year before its *third* trial, and

(c) it has been of public record since 1944 (Former R. 887).

Under the terms of the lease there was no joint or mutual interest, between the Paper Company and Justice Buford. The lessee was to pay and the lessor was to receive, and their interest was adverse and not joint (29 So. 2d text 734).

The petition has nowhere charged it to be a fact:

(a) that the terms of the lease were not the current going terms or that Justice Buford has not promptly complied with them,[36] or

(b) that Ball has any individual financial interest in the St. Joe Paper Company, directly or indirectly.

As to Justice Adams

The $80,000.00 mortgage of Justice Adams to the Florida National Bank of Jacksonville made June 29, 1945:

(a) was secured by more than 22,000 acres of land, 200 head of Hereford cattle and a large amount of automotive and farm equipment (Former R. 887-893), and

[36] The statement filed by Justice Buford shows that a well was drilled by an oil company and was abandoned in November, 1944, as a "dry hole" more than a year before the case was tried in the State Circuit Court, and all but a small portion of the lands were released and abandoned by Justice Buford so that the aggregate rentals payable (and paid) by him after the abandonment of the "dry hole" in November, 1944, amounted in the aggregate to less than $800 (29 So. 2d text 736).

(b) it bore interest at the rate of 4% per annum which this Court judicially knows was at least the current rate on mortgage loans at that time, and it was promptly recorded July 3, 1945,

(c) it was made while a motion for a new trial of the case was pending in the Circuit Court and more than 2 months before the motion was denied, and

(d) it was paid off and satisfied of record, January 10, 1946 (Former R. 843), approximately 10 months before the case was argued and submitted to the Florida Supreme Court.

The $30,000.00 mortgage of Justice Adams and Irlo Bronson to the Florida Bank at Fort Pierce made December 4, 1946:

(a) was secured by 3 parcels of improved property, the buildings upon which were required by the mortgage to be insured for not less than $30,000.00 (the full amount of the mortgage) (Former R. 900).[37] It was made after the Florida Supreme Court's decision was rendered.

(b) it was acknowledged by Justice Adams before the Clerk of the Supreme Court and has been a matter of public record since December 10, 1946 (Former R. 844-901).

(c) it bears interest at the rate of 4% per annum, which this Court judicially knows was at least the current rate on mortgage loans at the time the mortgage was made.

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[37] If Petitioner had chosen to do so, he could have informed this Court what everyone in Florida knows (or could ascertain upon slight inquiry), i.e., the personal financial status of both Justice Adams and Irlo Bronson.

The petition has nowhere charged it to be a fact:

(a) that the mortgages were not both amply secured[38] and appropriate loans for national and state banks to make and hold[39] or

(b) that Ball has any individual financial interest in or control of the Florida Bank at Fort Pierce, directly or indirectly, or

(c) that Ball was an officer or director of the Florida Bank at Fort Pierce or an officer of the Florida National Bank of Jacksonville, or that Ball or his counsel knew of the existence of the mortgage loans.

As to Both Justice Buford and Justice Adams

The petition does not show:

(a) that Ball has any individual or financial interest directly or indirectly in the duPont trust assets, or income;

(b) what the powers and duties are, of the four trustees of the duPont estate; by what means or authority Ball is the "dominant trustee" and "dominates" and controls the trust and the other three trustees[40], who must be presumed

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[38] Justice Adams in his statement filed with the Florida Supreme Court declared that both mortgages were "more than triply secured" (29 So. 2d next 737).

[39] This Court will take judicial notice that since the debacle of the 1930's both national and state laws and regulations prescribe rigid requirements with respect to the terms, security and soundness of mortgage loans made by national and state banks.

[40] Petitioner offers no excuse for failure to produce a copy of the duPont Will so that this Court might form its own opinion as to the relative powers of the four trustees. This Court judicially knows that under Florida law the Will is of probate and record (Sec. 732.26 Fla. Stat. 1941).

to have equal power with Ball, under the duPont will, until the will is produced, and *facts* asserted, to show the contrary.

Except for the concurrence by Justices Buford and Adams in the decision upon the merits, rendered against Petitioner upon the *third* appeal (sufficiently discussed, ante pp. 27-28), the making of the oil lease and the two mortgages are the only facts asserted in the petition, or in the brief in support of it, to disqualify Justice Buford and Justice Adams, who, for more than twenty years and more than six years respectively, had sat with distinction upon the highest Court of their State.

It is obvious that the petition does not show that either of the Justices was indebted to Ball, but if either or both of them had been indebted to Ball, such indebtedness would not have disqualified them unless they themselves considered it did so (*State ex rel. Tunnicliffe* v. *Koonce,* 100 Fla. 94, 129 So. 340).[41]

The truth is that the facts alleged in the petition to show bias and prejudice do not rise to the height of "party con-

[41] In the Tunnicliffe case, a Circuit Judge was indebted (the amount not stated) to an insolvent bank which had been taken over by the liquidator under state law. The judge disqualified himself in a pending cause between the liquidator and a debtor of the bank, upon the ground that he then was a debtor of the bank being liquidated and had a pecuniary interest. The judge of another Circuit was substituted. On mandamus the Florida Supreme Court required the debtor judge to take jurisdiction. It distinguished that case from those involving probate courts and other administrative functionaries. It held that the debtor judge was not a party and had no pecuniary interest in the result of the suit, that he was not ipso facto disqualified by reason of the debtor-creditor relationship. Therefore, in the absence of some statement (in his Certificate) *to show that by reason of that relationship, he was in fact biased or prejudiced,* he was not disqualified and must proceed with the case. Also that the substitute judge was without jurisdiction. See also: *Ash* v. *Barnsdall Oil Co.,* 118 F. 2d 699, (CCA-5) (1941), certiorari denied. 314 U. S. 643, 86 L. ed. 516, 62 Sup. Ct. Rep., 83; *Moses* v. *Julian,* 45 N. H. 52, (1863); *Moody* v. *Shuffleton,* Cal. App.-257 Pac. 564, (1927); *Conklin* v. *Crosby,* 29 Ariz. 60, 239 Pac. 506, (1925); *Johnson* v. *Dakan,* 9 Cal. App. 522, 99 Pac. 729.

tacts" as the petition by innuendo would have this Court infer. For the "contacts" are thrice removed. The petition shows:

(1) That Ball is one of the four trustees of the duPont estate and he is not shown to have any personal interest therein.

(2) That it is the duPont estate and not Ball which owns and controls the paper company and the two banks which respectively made the oil lease and held the mortgages; and

(3) That it is Ball individually who is party to the suit, and not the paper company and the banks.

This is too remote to constitute "party contact" between Ball and the two justices.

And not even all proximate party contacts are grounds for disqualification or voluntary recusation. Justices of this Court have not hesitated to sit in cases involving their former clients, or clients of their former law firms, in instances where the justice himself did not consider that he was disqualified.[42]

Since Justice Buford and Justice Adams were competent to continue in the cause and were not legally disqualified, it was their "duty to exercise judicial functions therein, * * * regardless of personal embarrassment or other considerations". *State ex rel. Palmer* v. *Atkinson,* 116 Fla. 366, 156 So. 726; *Trustees Internal Improvement Fund* v. *Bailey,* 10 Fla. 213.

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[42] *Yale Law Journal,* Vol. 56, No. 4, 605 pp. 612, 622, 623, 625.

Each had already exercised his judicial function and heard and taken part in the decision of the case. Voluntary recusation at that stage of the proceedings manifestly would have been an abandonment of their judicial duty which they were sworn to perform. And under the circumstances, circuit judges designated to sit in their places upon the petition for rehearing would have been without jurisdiction. *Trustees* v. *Bailey,* 10 Fla. 213. See also: *State ex rel. Tunnicliffe* v. *Koonce,* 100 Fla. 94, 129 So. 340. Voluntary recusation by either Justice Buford or Justice Adams under the circumstances would have violated all concepts of judicial duty and the orderly administration of the law.

As Mr. Chief Justice Taft pointed out, matters of kinship, *personal bias,* * * * remoteness of interest (a species of party contact), seem generally to be matters of state law. *Tumey* v. *Ohio,* 277 U. S. 510, 71 L. ed. 749.

From the earliest times, the Justices of this Court have exercised the prerogative of deciding for themselves whether they are disqualified for bias or prejudice. We have found no decision of this Court where that same prerogative has been denied to a Justice of the highest court of a State when his qualifications were called in question on those grounds. It is strange indeed that the established practice of the Justices of the Supreme Court of the United States should be thought by Petitioner to be subject to question when exercised by state supreme court justices.

B. The Decision Of The Florida Supreme Court Adjudging That Justices Buford And Adams Were Not Disqualified For Bias Should Be Conclusive.

Petitioner's supplemental petition for rehearing and Suggestion of Disqualification (Former R. 831-902) was ad-

dressed to the whole court (Former R. 831). It moved that Justices Buford and Adams either "recuse themselves or in the alternative that they be disqualified to participate in these proceedings". Justices Buford and Adams each filed a statement relating to the facts alleged. Each announced that he was "conscious of no bias or prejudice" for or against either party to the litigation, resulting from the matters suggested "or otherwise" (Former R. 904, 940, 158 Fla. 521, 29 So. 2d text 735, 737), and each asked the whole court to pass on the Suggestion.[43] The remaining five justices sitting en banc (Buford and Adams not participating) and constituting a quorum under Art. V., Sec. 4(a) of the Florida Constitution, proceeded to examine the Florida Statutes relating to disqualification of judges.[44] The court held that the Suggestion of Disqualification was upon the ground of prejudice and bias (158 Fla. 521, text 531, 29 So. 2d text 734). The decision then analyzed and considered the sufficiency of the petition to show disqualification in the light of the statute under which the Petitioner undertook to proceed.

The unanimous decision of the court was that Petitioner's Suggestion was insufficient in substance to disqualify Justices Buford and Adams.[45] The court further observed that voluntary recusation was not a matter for the court to decide but rather a matter for each individual justice to determine.[46] Justices Buford and Adams, having declined to re-

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[43] In *State ex. rel. Tunnicliffe* v. *Koonce,* 100 Fla. 94, 129 So. 340, it was held that unless facts (not necessarily resulting in bias) actually engendered conscious bias in the mind of the judge, he was not disqualified.

[44] Secs. 38.01 to 38.10 inclusive, Florida Statutes 1941.

[45] In this unanimous decision five justices concurred. Two of the concurring justices had dissented in the original five-to-two decision against Petitioner on the merits of the case.

[46] In Vol. 56, No. 4, Yale Law Journal, p. 612, it is noted that "in the United States Supreme Court, disqualification has always been the prerogative of each individual Justice", and further at p. 625, that "the Supreme Court is less inclined to disqualification than some of the state courts".

cuse themselves (Pet. p. 4) did not, however, stand on their own determination of the matter. Rather they submitted the question to the whole court. The court, following the practice observed in *Trustees* v. *Bailey,* 10 Fla. 213, decided the question, and held the two justices not disqualified.[47]

The decision of the Florida Supreme Court holding Justices Buford and Adams not disqualified for bias was eminently correct, as has been shown above. Moreover, this Court, in considering the effect of the Florida decision, should accord to the Florida Supreme Court the equal right to construe affidavits strictly, when judges are challenged for personal bias, which this Court accords to the inferior Federal courts. See *Beland* v. *United States,* 117 Fed. 2d 958, (C.C.A. 5); Cert. den. 313 U. S. 585, 85 L. ed. 1541; rehearing denied 314 U. S. 708, 86 L. ed. 1565.

The question involved in the case at bar, being merely one of asserted unconscious bias and *not* involving (i) bribery or (ii) dishonesty or (iii) an interest in the subject matter of the suit, was one peculiarly appropriate for consideration and decision by the Florida Supreme Court, and

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[47] The case at bar was the first time that an attempt has been made to disqualify a Florida Supreme Court Justice for bias since the enactment with respect to Circuit Judges. The Florida decisions uniformly hold that when an attempt is made to disqualify a Circuit Judge for bias or prejudice under the Statute he must examine the statements of fact contained in the affidavit in support of bias or prejudice, and if such statements of fact are insufficient to show bias or prejudice, of the Judge, he must deny the application, because a trial judge can no more disqualify himself under the statutes where the facts asserted do not justify it, than he can refuse to do so when such facts require it, *Theo. Hirsch Co.* v. *McDonald Furniture Co.,* (1927) 94 Fla. 185, 114 So. 517; *City of Palatka* v. *Frederick,* (1927) 128 Fla. 366, 174 So. 826.

Sec. 38.10 Fla. Stat. 1941, is the only Florida Statute relating to the disqualification of judges for bias or prejudice. It is substantially the same as the Federal Statute (28 U.S.C.A. 25), so the Florida Supreme Court says. *Theo. Hirsch Co.* v. *McDonald Furniture Co.,* 94 Fla. 185, text 191, 114 So. 517. The Federal Statute has been uniformly held to be inapplicable to appellate judges. *Kinney* v. *Plymouth Rock Squab Co.,* 213 Fed. 449 (C.C.A. 1, 1913); *Millslagle* v. *Olsen,* 128 Fed. 2d 1015 (C.C.A. 8, 1942).

one upon which its decision should be final and conclusive. *Jordan* v. *Massachusetts,* 225 U. S. 167, 56 L. ed. 1038.

In the *Jordan* case, the plaintiff in error had been convicted of murder. Upon motion for a new trial the disqualification of one of the jurors (necessary to conviction) was urged because of insanity. Upon a hearing, the Massachusetts court found "by a fair preponderance of all the evidence" that the juror was qualified. Upon writ of error, it was held by this Court that the qualification of the juror having been judicially determined by the Massachusetts courts (although upon disputed evidence), that determination was final and conclusive, being a matter peculiarly within the province of the state courts for decision.

In the case at bar (in addition to the determination by the two justices themselves that no ground existed for them to recuse themselves) Petitioner has also had a judicial determination by the unanimous decision of a constitutional quorum of the Florida Supreme Court, holding the two justices not disqualified.

Under the *Jordan* case, this decision by the State Court should be conclusive of the question, and this Court should not take jurisdiction.

C. The Suggestion Of Disqualification Came Too Late.

Petitioner's alleged bases of disqualification are: (i) That in 1944 Justice Buford had taken an oil lease from St. Joe Paper Co., a corporation owned and controlled by the duPont estate; and (ii) that in 1945 Justice Adams had borrowed money on a mortgage from Florida National Bank of Jacksonville, another duPont corporation (paid off and satisfied in January, 1946); and that after the decision of

this case, Justice Adams had borrowed money on a mortgage from Florida Bank at Ft. Pierce, also a duPont corporation; and that, accordingly, the justices might be biased in favor of Respondent Ball, one of the four trustees of the duPont estate, which owned those corporations.

These instruments were all of public record from the time of their execution. The case at bar was orally argued in the Florida Supreme Court early in November, 1946, and decided November 29, 1946. It was not until January 4, 1947, that Petitioner instituted a search of the public records (Former R. 902), and not until February 1, 1947, that the Suggestion of Disqualification was submitted.

Both the search of the records and the filing of the Suggestion came not only *after* the decision of the case by the Florida Supreme Court, but also *after* the filing of the petition for rehearing.

Petitioner seeks to excuse the fact that his Suggestion of Disqualification was submitted at that late date on the ground that, as soon as the "transactions" (related in the Suggestion) were discovered, "the facts were called informally to the attention of the Court" (Pet. Bf. p. 13). But the petition itself alleges that the Suggestion is "based upon facts that were discovered after this (the *third*) decision" (Pet. p. 3). The Former Record shows (p. 902) that Petitioner did not even *start to look* for them until more than a month *after* the decision had gone against him, and *after* the filing of a petition for rehearing.

Petitioner does not reveal just what spurred him into action in January, 1947 (when he instituted a search of the public records), nor why he did not do that very thing before submitting the case to the Supreme Court in November,

1946. But the fact remains that his delay until January 1947, (whether excusable or not) did afford him the chance that the two justices, who are now questioned, might hold with him on the merits of his case. Petitioner waited (whether negligently or intentionally, it does not matter) until after the two justices had concurred with three other justices in a five-to-two decision against him. Then, and only then, did he institute his inquiry.

Petitioner has not suggested that either of the two justices whose impartiality is questioned had any interest of any kind, proximate or remote, direct or indirect, on the outcome of the controversy between Petitioner Yates and Respondent Ball.

The only question here is one of asserted unconscious bias resulting, so Petitioner claims, from legitimate contracts publicly recorded, one a lease between Buford and St. Joe Paper Co. and the other, two mortgage loans by Adams from the two banks. He closed his eyes to same while he speculated on the outcome of the case, and only after he had lost, did he begin to look for something to support a charge of bias.

In its opinion holding that Justice Buford and Adams were not disqualified for bias, the Florida Supreme Court comments on this delay. *Ball* v. *Yates,* 158 Fla. text pp. 531-533, 29 So. 2d text pp. 733-735.

A similar situation was involved in *Voltman* v. *United Fruit Co.,* 147 Fed. 2d 514, where attempted disqualification for bias was raised after the trial of the case had been under way for some days. The Second Circuit Court of Appeals denied it, as coming too late.

And in *Millslagle* v. *Olson,* 128 Fed. 2d 1015, the Circuit Court of Appeals of the Eighth Circuit dismissed an affidavit of disqualification of the Judges of the Circuit Court of Appeals made upon petition for rehearing. Among other things, the court held that the affidavit was "not filed on time". That is the very situation in the case at bar.

Bias is not a common law ground of disqualification. *Yale Law Journal,* Vol. 56, No. 4, p. 605. Unless largely discretionary, it is statutory. The Florida Statute (Sec. 38.10 Fla. Stats. 1941) like the Federal Statute (28 U.S.C. 24-5) requires it to be raised *before* a case is submitted.

The case on the *third* appeal was submitted without objection to the seven justices sitting. Their decision was against Petitioner, five to two. One of the five justices who held against Petitioner was Justice Brown. Justice Brown retired from the court shortly after the decision. Had the Suggestion of Disqualification been interposed before the case was submitted to the court, Respondent would have had the benefit of Justice Brown's decision. That is no longer available.

The challenge of Justices Buford and Adams for bias, supposed to result from legitimate contracts with corporations owned by the duPont estate coming after the court's decision, is (i) unfair to the court; (ii) unfair to the two justices; and (iii) unfair to Respondent's counsel.

This Court should not take jurisdiction to disturb the Florida Supreme Court's decision.

D. The Decision Of The Florida Supreme Court Is A Valid Judgment, Irrespective Of The Status Of Justices Buford And Adams.

The *third* decision (*Ball* v. *Yates,* 158 Fla. 521, 29 So. 2d 729) was rendered in a case heard by the entire court "as a single body". All seven justices heard the case. The decision against Petitioner was concurred in by five justices; two justices dissented.

Thereafter, Petitioner sought to disqualify two of the five justices holding against him. As shown in sub-section A (pp. 24-35 ante) the two justices were not disqualified. And as shown in sub-section B (pp. 35-38 ante) the Florida Supreme Court unanimously held the two justices not to be disqualified. And as shown in sub-section C (pp. 38-41 ante) the Suggestion of Disqualification came too late.

However, assuming, for the sake of the argument, that the two justices might be considered disqualified, still the decision went against Petitioner, by a three to two decision of a constitutional quorum of the Florida Supreme Court.[48] Such a decision is due process of law.

Moreover, such a decision has been held by the Florida Supreme Court to constitute a valid Florida Supreme Court decision. *Caples* v. *Taliaferro,* 146 Fla. 122 (text p. 131) 200 So. 378.

In the *Caples* case there had been two consolidated appeals in companion cases. The judgments of the lower court

[48] The Florida Constitution (Sec. 4(a), Art. V.) provides: "The Supreme Court may hear, consider and determine cases and exercise all its powers and jurisdiction as a single body in which case a majority of the members of the Court shall constitute a quorum for the dispatch of business; or it may exercise its powers and jurisdiction in divisions".

were reversed. The decision was four to two for reversal. One of the four justices who concurred in the reversal was disqualified; he had formerly participated in the matter as State Attorney General. Upon this being noted, a rehearing was ordered and a Circuit Judge took his place.

Upon reargument, the six justices stood three to three, and the original decision was adhered to (with certain modification not relevant here). Appellee moved to vacate the judgment on the ground that the original four to two judgment of reversal was *void* because of the participation of a disqualified justice and the further ground that since the final count stood three to three, there must be an affirmance under the settled Florida appellate practice.

This motion was denied by a *unanimous* decision holding that the original decision was a valid decision and that because there was not a majority vote to overturn it, it must stand. The court said:

> "Three qualified Justices voted to reaffirm both appellate decrees as rendered, while only two Justices dissented. The mere fact that a technically disqualified Justice inadvertently joined in the opinions with three qualified Justices could not destroy the validity of the appellate decrees as rendered, when three qualified Justices voted to reverse the decrees while only two Justices dissented."

In the case at bar we have the same situation. The decision sought to be reviewed was by a five to two majority against Petitioner. Assuming for the sake of the argument that two of the majority might be considered disqualified, that still left a valid decision against Petitioner by a three to two vote of a constitutional quorum of the court.

A valid state court judgment by five qualified justices of a state Supreme Court can hardly be deemed to be a denial of due process, and this Court should not take jurisdiction to disturb same.

E. The Judgment Of The Florida Supreme Court Does Not Deny Petitioner Due Process Of Law.

It is charged in the petition for certiorari and supporting brief that the participation of Justices Buford and Adams in the decision of this case by the Florida Supreme Court, denied Petitioner due process of law in contravention of the 14th Amendment.[49]

The many inaccuracies of the petition and supporting brief are catalogued (ante, pp. 20-29). In sub-section A, it is shown that the averments of the Suggestion of Disqualification disclose no bias of the justices which would constitute a disqualification (ante, pp. 29-35). A constitutional quorum of the Florida Supreme Court (*excluding* Justices Buford and Adams) decided unanimously that the two justices were not disqualified for bias (ante. pp. 35-38). This decision is on a point peculiarly within the province of state courts. The decision of the Florida Supreme Court is a valid judgment under Florida law, and, being a three to two decision against Petitioner, is not a denial of due process (ante, pp. 42-44).

The only question here is whether the facts charged in the Suggestion transcend the unanimous decision of the Florida Supreme Court (that no sufficient bias was shown to amount to disqualification) and amount to the denial of due process under the Federal Constitution.

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[49] No question of "equal protection of the laws" is involved in this case.

It is our view that the showing made by Petitioner in his Suggestion of Disqualification (Former R. 831) does not involve one of those "very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process" (as this Court put it in *Jordan* v. *Massachusetts,* 225 U. S. text p. 174).

No charge is made that either of the justices had any personal interest in the outcome of the controversy between Petitioner Yates and Respondent Ball. The maximum of Petitioner's charge is that the two justices were unconsciously biased in favor of Ball and against Yates because St. Joe Paper Company had executed an oil lease to Buford in 1944 at the going rate and the two banks had made legitimate mortgage loans to Adams, the lessor and mortgagees being owned and controlled by the duPont estate, of which estate Ball was one of the four trustees.[50]

These facts, insofar as they might be considered to show bias, do not involve constitutional invalidity. This is clear from this Court's opinion in *Tumey* v. *Ohio,* 273 U. S. 510, 71 L. ed. 749, a case involving a personal pecuniary interest of the trial judge in the subject matter of the cause. The opinion in the *Tumey* case clearly draws the distinction, thus:

> "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion. Wheeling v. Black, 25 W. Va. 266, 270. But it certainly violates the 14th Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a

[50] The detailed nature of these transactions is set forth, ante, pp. 29-35.

> court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case."

And in *Jordan* v. *Massachusetts,* 225 U. S. 167, 56 L. ed. 1038, this Court held that a determination by the Massachusetts courts of the qualification of a juror (whose vote was essential to conviction for murder) upon a mere preponderance of the evidence, did not deprive the defendant of due process, the matter being one peculiarly for determination by the state court.

In the case at bar, the Florida Supreme Court has likewise determined the qualification of Justices Buford and Adams. *Ball* v. *Yates,* 29 So. Ed., text 733-735. This was a unanimous decision by a constitutional quorum of five justices. That should settle the question.

The principles enunciated in the *Tumey* case and the *Jordan* case were reiterated with approval in *N. L. R. B.* v. *Baldwin L. Works,* 128 Fed. 2d 39, text 45, footnote 9, and have been followed in three states, where it has been held that bias which might be presumed from "party contacts" of a judge does not involve denial of due process under the 14th Amendment.

> *M. K. & T. Ry. Co. of Texas* v. *Mitcham,* 57 Tex. Civ. App. 134, 121 S.W. 871;
>
> *Ison* v. *Western Vegetable Distributors,* 48 Ariz. 104, 59 Pac. 2d 649;
>
> *Brents* v. *Burnett,* 295 Ky. 337, 174 S.W. 2d 521.

It is, therefore, respectfully urged that the decision of the Florida Supreme Court (158 Fla. 521, 29 So. 2d 733-735) holding that the two justices were not disqualified for bias

is conclusive of the matter under this Court's decision in the *Jordan* case, and that, as this Court's opinion in the *Tumey* case points out, "personal bias" and "remoteness of interest" do not involve constitutional invalidity.

II. The Question Of The Disqualification Of Justices Buford And Adams On The Third Appeal Was Rendered Moot By The Fourth Decision Of The Florida Supreme Court To The Same Effect, But With A Different Personnel Which Included Neither Of Such Justices.

Shortly before he took the *fourth* appeal to the Florida Supreme Court, Petitioner set out to replace justices who had concurred in the *third* decision. Of the five justices who concurred in that *third* decision, two, Justices Brown and Buford, had then already retired from office. Petitioner then persuaded a third of such concurring justices, viz: Justice Adams, to recuse himself (R. 85) and attempted to induce a fourth, viz: Justice Barns, likewise to recuse himself (R. 84-85), but Justice Barns declined to do so (R. 85-86); whereupon, Petitioner filed in said court an Affidavit of Disqualification[51] against him, based on prejudice and bias, which said court denied (Pet. Bf. p. 3, R. 73-85). So that the *fourth* appeal was heard and decided by a seven judge court comprised of (a) two justices who had con-

[51] The grounds of the Affidavit of Disqualification filed against Justice Barns were, (i) that Petitioner's chief counsel had lately been Justice Barns' benefactor and that in writing the opinion on the *third* appeal, Justice Barns had shown himself to be an ingrate (R. 73, text 80), and (ii) that he was a falsifier of facts (R. text 78), and (iii) that Petitioner's said counsel made to third parties statements (so said the affidavit) which could not have done other than to provoke personal animosity of said Justice Barns to said counsel, and that said statements were made to persons whom the said counsel knew would communicate them to Justice Barns and were made for that purpose, so that Petitioner feared that he was biased (R. 73 text 77). Petitioner makes no claim at all in this Court that Justice Barns was disqualified. It would have been futile for him to do so, for it is settled law that a lawyer in a case cannot disagree with the judge and deliberately provoke an incident rendering the judge disqualified to proceed further therein. *State ex rel Fuente, et al,* v. *Himes, as Judge, etc.,* 160 Fla. 757, text 767-8, 36 So. 2d 433.

curred in said *third* decision, viz: Justices Barns and Thomas, and (b) two who had dissented therefrom, viz: Justices Terrell and Chapman, and (c) three new justices who had not participated therein, viz: Justices Hobson, and associate Justices Gillis and Taylor.

On February 3, 1949, shortly before the *fourth* appeal was argued, Petitioner filed in the Florida Supreme Court, a petition to recall the mandate issued on the *third* appeal, and affirm the judgment from which the *third* appeal was taken (R. 86-96). Among the grounds for the relief prayed the Petitioner asserted substantially the same supposed bias and prejudice of Justices Buford and Adams, which appeared in the Affidavit of Disqualification filed against them pending the petition for rehearing on the *third* appeal (Former R. 831) except that he claimed no Federal Constitutional violations. Afterwards, on February 8, 1949, Respondent filed in said court his reply and motion to dismiss the said petition (R. 97-102), among other things, denying the disqualification of said justices and asserting the validity of the *third* decision. Afterwards, on February 17, 1949, the *fourth* appeal was argued in the Florida Supreme Court and on July 26, 1949, the petition was *denied,* and Respondent's judgment was affirmed by the *fourth* (and last) decision of the Florida Supreme Court, ... Fla. .....; 44 So. 2d 302. It is obvious that with the denial of said petition and the coming down of the *fourth* (and last) decision (R. 102) any question about disqualification of Justices Buford and Adams on the *third* appeal became moot, for on this *fourth* (and last) appeal Justices Buford and Adams *did not participate.* The court, as reconstituted, consisted of seven justices whose impartiality is not here called in question. And the Petitioner voluntarily submitted to that newly constituted court for its decision all questions involving the disqualification of Justices Buford

and Adams, as well as the merits of the case upon the *fourth* appeal. Thus, it is obvious that the supposed infirmity in the *third* decision, does not inhere in the *fourth* (and last) decision, the one now sought to be reviewed. Moreover, the new court reached the very same decision that had been reached by the court, two-sevenths of whose impartiality was impugned here on the former petition for certiorari (156, October Term 1947).

This not only discloses (i) that Petitioner's question is now moot, but it also shows (ii) that Petitioner never was prejudiced by the participation of the two challenged justices in the *third* decision which this court declined to disturb in *Yates* v. *Ball,* 332 U.S. 774, 92 L. ed. 359.

So this *second* petition for certiorari should be denied.

POINT V.

The Civil Rights Act Is Inapplicable To This Case.

Petitioner's fifth "question presented" seeks to invoke that portion of the Civil Rights Act (Title 8, Section 47 (2-3) U. S. Code) which renders actionable conspiracies to obstruct the due course of justice with intent to deny to citizens the equal protection of the laws.

The portion of the statute sought to be invoked by Petitioner, as a ground of certiorari, reads as follows:

> "or if two or more persons * * * * conspire for the purpose of impeding, hindering, obstructing or defeating, in any manner, the due course of justice in any State or Territory, *with intent* to deny to any citizen the *equal protection of the laws*"; * * * * (and) "if one

or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having or exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an *action for the recovery of damages,* occasioned by such injury or deprivation, against any one or more of the conspirators." Title 8, Sec. 47, U. S. Code.

The gist of the cause of action created by this statute is: (i) a conspiracy (ii) to obstruct justice, (iii) with intent to deny equal protection of the laws (iv) whereby another is deprived of some privilege of a citizen of the United States.

There are several reasons why the Act has no application here.

1. The Question Never Was Specially Set Up Or Claimed In The State Courts, Nor Did The State Courts Ever Pass Upon Same.

No question of any "right, privilege or immunity" under the Civil Rights Act was ever "specially set up or claimed" by Petitioner, either (a) in the trial court or (b) in the Florida Supreme Court, as is required (to make it available on certiorari) by Title 28, Section 1257 (3), U. S. Code, and the decisions of this Court. The lower courts were never given an opportunity to pass on any such question.

The petition for certiorari and the supporting brief nowhere specify (as the rules of this Court require) the stage in the proceedings in the state courts at which and the manner in which this question is supposed to have been raised, nor the method of raising it nor the way in which it is supposed to have been passed upon.

Moreover, the record is barren of any claim, "specially set up" in the lower courts, of *a conspiracy to obstruct justice with intent to deny petitioner equal protection of the laws.* No such issue was ever raised. The record is likewise barren of any factual determination by the state courts of the existence of any of the essential facts within purview of the Act. No such issues were ever determined.

The question is, therefore, not available here.

2. The Question Presented Is Moot.

In undertaking to invoke the Civil Rights Act as a basis of jurisdiction here, Petitioner's minor premise is that remote party contacts, between Justices Buford and Adams and Respondent, resulted in bias and prejudice on the part of the two justices influencing their concurrence with three other justices in the five-to-two decision of the Florida Supreme Court, November 29, 1946, *Ball* v. *Yates,* 158 Fla. 521, 29 So. 2d 729.[52]

However, even if it be supposed that the alleged disqualification of Justices Buford and Adams imported a Federal question at the time of the former petition for certiorari, *that question no longer exists.* For as we have shown under Point IV (ante. pp. 47-49) it became moot on July 26, 1949, when the Florida Supreme Court rendered its *fourth* and last decision (R. 102), in which Justices Buford and Adams *did not participate.*

[52] On his *former* petition for certiorari (No. 156, October Term, 1947) involving the decision cited, petitioner posed the identical minor premise to indicate denial of due process and equal protection in contravention of the 14th Amendment. This Court denied same. *Yates* v. *Ball,* 332 U. S. 774, 92 L. ed. 359.

3. Petitioner Seeks Piecemeal Review.

Petitioner could just as well have raised his Civil Rights Act question on his former petition for certiorari. This question (if indeed any such question exists) is necessarily based upon the factual record that was before this Court in No. 156, October Term, 1947, 332 U. S. 774, 92 L. ed. 359. Accordingly Petitioner should now be precluded from seeking "piecemeal" review.

4. The Express Provisions Of The Statute Render It Altogether Inapplicable Here.

The statute sought to be invoked by Petitioner is not susceptible of the construction that it can be applied to the case at bar as a ground of certiorari.

(a) The statute is explicit. It creates a cause of action for the recovery of damages (cognizable in the U. S. District Courts, Title 28, Sec. 1343, U. S. Code) by any citizen denied equal protection of the laws as the result of a conspiracy to obstruct or defeat the due course of justice for such purpose.

The statute, as is well known to all, was enacted by the Congress at the close of the Civil War for the avowed purpose of protecting the freedmen in their civil rights as citizens of the United States, including inter alia[53] the then lately established constitutional right to *equal protection* of the laws.

The necessary implication of the express statutory provision for a *specific* remedy (viz: the recovery of damages

[53] Other particulars of the Act are not relevant here, except to emphasize the specific purposes of the legislation.

for injury resulting from the proscribed conspiracy to deny equal protection) is that the statute affords no *other* unmentioned remedies, such, for example, as its employment here as ground for review of a judgment of a State Supreme Court.

(b) Moreover, the statute does not condemn in broad and sweeping terms conspiracies to deny equal protection of the laws in judicial proceedings, leaving the courts to devise remedies of one sort or another to implement the statute. All that the statute does is to implement the 14th Amendment, *in one specific particular,* that is, to afford a suit for damages in the Federal courts to those injured by a conspiracy to deny them equal protection.

(c) The statute in nowise provides that an alleged conspiracy with intent to deny citizens equal protection, shall warrant an inquisition of the facts by this Court in order to review judgments of state courts, supposedly affected by such conspiracy. The statute specifically designates the forum for all such factual determinations (i.e. the U. S. District Courts).

(d) The statute does not purport to confer on this Court jurisdiction to review decisions of the state courts in order to determine whether such decisions may have been affected by a conspiracy to deprive a litigant of equal protection.

(e) The statute does not purport to confer "a title, right, privilege or immunity" which may be "specially set up" in the state courts and thus afford review by certiorari under Title 28, Section 1257 (3) U.S. Code. All that the statute does is to *create a special statutory action in tort for damages for injury* resulting from such conspiracy.

(f) The record here shows no evidence of any *conspiracy* whatever. The record here shows no evidence of an *intent* to deprive Petitioner of *equal protection*. The record here shows nothing indicating that Petitioner has been denied *equal protection*. See *Mitchell* v. *Greenough*, 100 F. 2d 184 (C.C.A. 9, 1938) cert. den. 306 U.S. 659, 83 L. ed. 1056; also *Bottone* v. *Lindsley*, 170 F. 2d 705 (C.C.A. 10, 1948).

It is, therefore, respectfully urged that the Civil Rights Act affords no ground of jurisdiction of the petition for certiorari.

POINT II.

The Right To Trial By Jury Provided By The 7th Amendment Constitutes No Ground For Certiorari In This Case.

Petitioner's second question (Pet. p. 7), argued at pp. 21-25 of his supporting brief, invokes the 7th Amendment. Petitioner claims that the judgment of the Florida Supreme Court violated the 7th Amendment, because, so he claims (Pet. p. 6), the 14th Amendment makes the 7th Amendment "applicable to state action," and further because, so he claims, the Florida Supreme Court denied him the right to trial by jury. Petitioner concedes that this Court has never held that the right of trial by jury embodied in the 7th Amendment is applicable to state courts by virtue of the 14th Amendment. But he urges (i) that such a thesis should be considered and (ii) that this case affords the opportunity.

In reply it is sufficient to say:

(a) That this Court has heretofore decided this precise question against Petitioner in this case.

(b) That the judgment of the Florida Supreme Court did not deny Petitioner a trial by jury.

(c) That the judgment sought to be reviewed is based upon independent, adequate, non-federal grounds.

(d) And that numerous decisions of this Court are determinative of the constitutional point adversely to Petitioner.

A. This Court Has Already Decided This Identical Question Against Petitioner.

The identical question now raised by Petitioner was previously raised here by him in this case by his former petition for certiorari (No. 156, October Term, 1947, question 2, p. 3; supporting brief pp. 19-23).

And this Court decided against Petitioner, denying his petition, October 13, 1947. *Yates* v. *Ball*, 332 U. S. 774, 92 L. ed. 359.

That ought to end the matter.

B. The Judgment Of The Florida Supreme Court Did Not Deny Petitioner A Trial By Jury.

As we said on the former petition (See Respondent's Brief, pp. 13-17, No. 156, October Term, 1947) we say again, Petitioner's second question (Pet. p. 7) and his restatement of it in his present brief (p. 21) do not accurately reflect the record.

Petitioner asserts in his petition and in his brief (p. 21) that, on the *first* appeal, the Florida Supreme Court held

his evidence sufficient to entitle him to go to the jury. That is true. *Yates* v. *Ball,* 132 Fla. 132, 181 So. 341.

But, in the very same sentence, Petitioner further asserts that, in two succeeding trials, juries returned verdicts for him "on the same evidence." That is *not* true.

Petitioner has not brought here, in support of his assertion, (i) the record on the *first* trial (reviewed in 132 Fla. 132, 181 So. 341) nor (ii) the record on the *second* trial (reviewed in 145 Fla. 521, 200 So. 692) nor (iii) the record on the *third* trial (reviewed in 158 Fla. 521, 29 So. 2d 729).

The record here fails to support Petitioner's assertion that the verdicts at the *second* and *third* trials were "on the same evidence" as that submitted on the *first trial.* Nor does the record here on the former petition for certiorari (No. 156, October Term, 1947) support Petitioner's assertion.

However, it is not necessary to rely on Petitioner's failure to bring here the necessary record to support his fundamental assertion (although that is his burden under this Court's decisions). The decisions of the Florida Supreme Court, of which Petitioner (now for a second time) complains, both show that Petitioner's assertion is untrue. Both decisions, reversing jury verdicts for Petitioner, show, that on the *second* and *third* trials, the evidence was *different* from that on the first trial. See *Ball* v. *Yates,* 145 Fla. 537, 200 So. 692, and *Ball* v. *Yates,* 158 Fla. 521, 29 So. 2d 729, text pp. 733, 737-738.

The first of those decisions expressly noted the difference between the evidence on the *first* trial and that on the *second* trial; and the *second* decision (to the same effect) sup-

plied a bill of particulars of the various legal insufficiencies of Petitioner's case on the *second* and *third* trials.

Accordingly, it is clear that there is no foundation in the record for Petitioner's jury question.

But suppose, for the sake of the argument, that the evidence had been the same on all three trials and appeals (as Petitioner mistakenly asserts) and suppose that on the *second* and *third* appeals the Florida Supreme Court had taken a different view of the evidence from that taken by it on the *first* appeal, and that, thereby, the Florida Supreme Court had departed from the law of the case. Still no federal question arises, for this Court has invariably held that no provision of the Federal Constitution precludes a state court from modifying its views while a case remains pending.[54]

King v. *West Virginia,* 216 U.S. 92, 54 L. ed. 396;

Lewers & Cooke v. *Atcherly,* 222 U.S. 285, 56 L. ed. 202;

Messinger v. *Anderson,* 225 U.S. 436, 56 L. ed. 1152;

Moss v. *Romey,* 239 U.S. 538, 60 L. ed. 425;

Rooker v. *Fidelity Trust Co.,* 261 U.S. 114, 67 L. ed. 556.

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[54] By the same token state courts may overrule prior decisions without violating the Federal Constitution. *Backus* v. *Fort Street Union Depot,* 169 U. S. 557, 42 L. ed. 853; *Patterson* v. *Colorado,* 205 U. S. 454, 51 L. ed. 879; *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 68 L. ed. 382; *Brinkerhoff-Faris Trust & Savings Co.* v. *Walter O. Hill,* 281 U. S. 673, 74 L. ed. 1107; *Cross Lake Shooting and Fishing Club* v. *State of Louisiana,* 224 U. S. 632, 56 L. ed. 924. And finally, erroneous decisions by state courts of state law are held not to contravene the Federal Constitution. *Bonner* v. *Gorman,* 213 U. S. 86, 53 L. ed. 709; *American Railway Express Co.* v. *Kentucky,* 273 U. S. 269, 71 L. ed. 639; *Central Land Co.* v. *Laidley,* 159 U. S. 103, 40 L. ed. 91; *Arrowsmith* v. *Harmoning,* 118 U. S. 194, 30 L. ed. 243; *Standard Oil Co.* v. *Missouri,* 224 U. S. 270, 56 L. ed. 760; *Kryger* v. *Wilson,* 242 U. S. 171, 61 L. ed. 229; *Milwaukee E. R. & L. Co.* v. *Wisconsin,* 252 U. S. 100, 64 L. ed. 476; *Worcester County Tr. Co.* v. *Riley,* 302 U. S. 292, 82 L. ed. 268.

C. The Judgment Of The Florida Supreme Court Is Based Upon Independent, Adequate, Non-Federal Grounds.

The decisions of the Florida Supreme Court (*Ball* v. *Yates,* 145 Fla. 537, 200 So. 692; *Ball* v. *Yates,* 158 Fla. 521, 29 So. 2d 729; *Yates* v. *Ball,* ..... Fla. ....., 44 So. 2d 302) which Petitioner seeks to have reviewed are based upon independent, adequate, non-federal grounds.

In Ball v. *Yates,* 145 Fla. 537, 200 So. 692, the Florida Supreme Court held that the evidence in its entirety was legally insufficient to support a verdict for Petitioner.

In *Ball* v. *Yates,* 158 Fla. 521, 29 So. 2d 729, the Florida Supreme Court held that the trial court had "erred in not directing a verdict for the defendant (Respondent) after all the evidence was in." In so holding, it specified the following grounds for its decision, to-wit:

(1) That the evidence in its entirety was legally insufficient to establish (a) that the purported agent was the authorized agent of Respondent, or (b) that Respondent had ever ratified the purported agency.

(2) That the evidence was legally insufficient to establish either (a) a contract duly made between the parties or (b) subsequent ratification of an unauthorized promise, or (c) any meeting of the minds of the parties whatever.

(3) That the alleged oral promise of Respondent to Petitioner was in contravention of the Florida Statute of

Frauds and, therefore, unenforceable in an action at law for damages.[55]

(4) And finally that, under the doctrine of the law of the case, the *third* appeal was ruled by the *second* appeal (145 Fla. 537, 200 So. 692) where the Supreme Court had held unanimously that the evidence in its entirety was legally insufficient to make a case for Petitioner.

In *Yates* v. *Ball,* ..... Fla. ....., 44 So. 2d 302, the Florida Supreme Court affirmed without opinion, a final judgment for Respondent. This decision, in effect, held that the evidence was legally insufficient to make a case for Petitioner.

Whether or not a case falls within the state statute of frauds, and is therefore unenforceable, is merely a question of state law. The same thing is, of course, true of the sufficiency of the evidence, as a matter of state law, to make a case. Those are questions of state law for exclusive de-

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[55] At pages 20-21 of his supporting brief, Petitioner assails the Florida Supreme Court for perpetrating a "fraud" on him in its decision holding his case to be within the state statute of frauds and, therefore, unenforceable in an action at law for damages. The applicability of the statute of frauds is merely a matter of state law with which this Court is not concerned. However, since Petitioner gratuitously charges the Florida Supreme Court with a "fraud" in order "to prevent review by this Court," we deem it in order to point out Petitioner's error.

Petitioner mistakenly asserts that "upon at least six prior occasions" he "successfully resisted" in "the Supreme Court of Florida" Respondent's contention that this case is ruled by the debt-of-another provision of the Florida statute of frauds. That is not true; nor does the record support it. The truth is that on the *first* appeal the question was not raised. On the *second* appeal Respondent urged the point as one of the grounds of reversal. But the Supreme Court reversed on another ground. Under the law of Florida (*F.E.C. Ry. Co.* v. *Geiger,* 66 Fla. 582, 64 So. 238; *Paul* v. *Com. Bank of Ocala,* 69 Fla. 62, 68 So. 68) and this Court also (*Mutual Life Insurance Co.* v. *Hill,* 193 U. S. 551, 48 L. ed. 788) that decision left the question still "open for consideration". On the *third* appeal, the Florida Supreme Court held the statute applicable, which ends the case on an independent, adequate, non-federal ground. Petitioner's characterization of that decision as "nothing short of a fraud" in order "to prevent review by this Court" is not warranted.

termination by the state courts on a motion for directed verdict. No federal ground is involved.[56]

Thus, it is clear that the case at bar was decided by the state courts on independent, adequate, non-federal grounds, involving matters of local state law, and accordingly the constitutional question of the right to trial by jury is unnecessary to be decided.[57]

It is hardly necessary to cite to this Court, law to support the well-settled principle that if a state court judgment is based upon an adequate independent non-federal ground, that renders the decision of a federal constitutional question by this Court unnecessary. But see decisions cited at page 19 of Respondent's brief here in No. 156, October Term 1947; also *Lynch* v. *New York,* 293 U.S. 52, 79 L. ed. 191, *Public Service Com.* v. *Wisconsin Tel. Co.,* 309 U.S. 657, 84 L. ed. 1006, *California* v. *Lifflefloren,* 335 U.S. 906, 93 L. ed. 374.

D. Numerous Decisions Of This Court Are Adverse To Petitioner's Contention That The Federal Constitution Assures To A State Court Litigant A Right Of Trial By Jury In Common Law Cases.

Petitioner's thesis is that the 7th Amendment is made applicable to the states by virtue of the 14th Amendment; fur-

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[56] At pages 21-22 and 28 of his brief Petitioner cites *Lavender* v. *Kurn,* 327 U. S. 645, 90 L. ed. 916 and *Ellis* v. *Union Pac. R. R. Co.,* 329 U. S. 649, 91 L. ed. 572, which were cases arising under the Federal Employers' Liability Act. The question of the legal sufficiency of evidence under an Act of Congress is, of course, a *federal* question. So those cases are not in point here for the question here is simply a matter of *state* law, namely the application of the Florida statute of frauds and the sufficiency of evidence to establish agency, ratification, or an actionable promise, under the law of Florida.

[57] It is well settled Florida law that the direction of a verdict for insufficient evidence to make a case is not a violation of Section 3 of the Declaration of Rights of the Florida Constitution; it is also well settled law of this Court that the direction of a verdict in the circumstances mentioned is not a violation of the 7th Amendment. See authorities cited and referred to, post, pp. 67-68.

ther that he was deprived of a jury trial in a common law case by action of the state courts.

It is obvious (by reference to the two preceding subsections "B" and "C" of this brief) that Petitioner was not deprived of a jury trial by the Florida Supreme Court. In its last three decisions in this case it has consistently held that the evidence in its entirety did not make a case for a jury, i.e. did not establish any cause of action at all.[58]

However, it would seem that this Court has long since concluded that a state court litigant is not assured a jury trial by virtue of the Federal Constitution.

1. In *Walker* v. *Sauvinet,* 92 U.S. 90, 23 L. ed. 678 and *Minneapolis* v. *Bombolis,* 241 U.S. 211, 60 L. ed. 961, this Court held that a state court litigant is not entitled to a jury trial under the 7th Amendment.

2. This Court has likewise repeatedly held that a state court litigant is not entitled to a jury trial under the 14th Amendment. *Walker* v. *Sauvinet,* 92 U.S. 90, 23 L. ed. 678; *New York, etc.* v. *White,* 243 U.S. 188, 61 L. ed. 667; *Wagner, etc.* v. *Lyndon,* 262 U.S. 226, 67 L. ed. 961; *Southern R. Company* v. *Durham,* 266 U.S. 178, 69 L. ed. 231; *Hardware, etc.* v. *Glidden Co.,* 284 U.S. 151, 76 L. ed. 214; *Brown* v. *Mississippi,* 297 U.S. 278, 80 L. ed. 682; *Dohany* v. *Rogers,* 281 U.S. 362, 74 L. ed. 904.

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[58] Acceptance by this Court of Petitioner's argument would inevitably result in this Court having to review every final decision in the courts of the forty-eight states holding the evidence legally insufficient to go to the jury. There are difficulties enough in the various types of cases arising under Acts of Congress (where this Court reviews the sufficiency of evidence). *Galloway* v. *United States,* 319 U. S. 372, 87 L. ed. 1458 (see text 319 U. S. p. 395). To multiply those difficulties by 48 would be intolerable. But that is not all. If Florida is typical of the states generally, then there are several formulae in each state for testing the legal sufficiency of evidence to establish various types of actions.

3. In many recent decisions this Court has reiterated its earlier holdings with approval. *Palko* v. *Connecticut,* 302 U.S. 319, 82 L. ed. 288; *Malinski* v. *New York,* 324 U. S. 401, 89 L. ed. 1029 (concurring opinion of Mr. Justice Frankfurter); *Fay* v. *New York* & *Bove* v. *New York,* 332 U.S. 261, 91 L. ed. 2043; *Wolf* v. *Colorado,* 338 U.S. 25, 93 L. ed. 1782.

In the latter case this Court stated pointedly:

> "The notion that the 'due process of law' guaranteed by the 14th Amendment is shorthand for the first eight amendments of the Constitution and therefore incorporates them has been rejected by this Court again and again, after impressive consideration, (citing cases). Only the other day the Court reaffirmed this rejection after thorough reexamination of the scope and function of the Due Process Clause of the Fourteenth Amendment. *The issue is closed.*"

4. In analogous situations this Court has further held that neither (i) the double jeopardy clause nor (ii) the self-incrimination clause of the 5th Amendment is absorbed into the 14th Amendment. *Palko* v. *Connecticut,* 302 U.S. 319, 82 L. ed. 288; *Adamson* v. *California,* 332 U.S. 46, 91 L. ed. 1903. Also that the jury trial provision of the 6th Amendment is not "picked up" by the 14th Amendment, *Fay* v. *New York, Bove* v. *New York,* 332 U.S. 261, 91 L. ed. 2043. Also, most recently, that the unreasonable search and seizure guaranty of the 4th Amendment is not made effective, by virtue of the 14th Amendment, in state court prosecutions. *Wolf* v. *Colorado,* 338 U.S. 25, 93 L. ed. 1782.

This Court's rejection of the thesis of absorption into the 14th Amendment of the four clauses of the 4th, 5th and

6th Amendments mentioned above is most convincing authority against Petitioner's thesis that the 7th Amendment is absorbed into the 14th. This is especially so in the light of the long line of decisions cited in paragraphs 1, 2 and 3 just above.

Admittedly the due process clause of the 14th Amendment makes it unlawful for states to abridge freedom of speech, freedom of the press, the free exercise of religion or the right of peaceable assembly, guaranteed by the 1st Amendment.

What then is the dividing line? And, in which class does the right to trial by jury in civil cases lie?

The opinion of Mr. Justice Cardozo, in *Palko* v. *Connecticut,* 302 U.S. 319 (text p. 325), 82 L. ed. 288, answers both questions, thus:

> "The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder* v. *Massachusetts,* supra (291 U.S. p. 105, 78 L. ed. 677, 54 S. Ct. 330, 90 A.L.R. 575); *Brown* v. *Mississippi,* supra (297 U.S. p. 285, 80 L. ed. 686, 56 S. Ct. 461); *Hebert* v. *Louisiana,* 272 U.S. 312, 316, 71 L. ed. 270, 272, 47 S. Ct. 103, 48 A.L.R. 1102. Few would be so narrow or provincial as to maintain that a fair and en-

> lightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining* v. *New Jersey*, 211 U.S. 78, 53 L. ed. 97, 29 S. Ct. 14, supra. This too might be lost, and justice still be done."

We submit that both upon authority and reason the 7th Amendment is not "picked up" by the 14th and that the Federal Constitution does not guarantee jury trials to state court litigants.

POINT III.

The Admission Of Florida Into The Union By Act Of Congress Did Not Metamorphose The Provisions Of The State Constitution Into Federal Rights Upon Which Certiorari May Be Based.

Petitioner's third question (Pet. p. 7) presented at pp. 25-28 of his brief, is based upon the *assumption* that he was denied the right of trial by jury, in violation of Section 3 of the Declaration of Rights of the Constitution of the State of Florida.

Upon that mistaken assumption, Petitioner claims that he is entitled to certiorari here because he says the Act of Congress, of March 3, 1845, admitting Florida into the Union, transmuted Florida constitutional provisions (particularly the trial-by-jury provision) into federal rights, and that such a synthesized federal right affords ground for certiorari in this case.

Petitioner cites nothing in support of his admittedly novel question, except certain language in three opinions of this Court, and one dissenting opinion, which in general terms,

extol the virtues of jury trials. These opinions shed no light on Petitioner's hypothesis. That the language in these opinions is largely hyperbole is indicated by Mr. Justice Black's dissent in the *Galloway* case (post, p. 68) in which he complains of the disregard of his view of the correct interpretation of the 7th Amendment.

Petitioner offers no thesis, for he presents no discussion. The best that can be said for him is that he merely postulates an hypothesis offering nothing whatever to support it.

For a number of reasons, Petitioner's hypothesis is both (i) unavailing and (ii) untenable.

(a) Petitioner's third question was never raised nor decided in the state courts.

(b) Petitioner is seeking piecemeal review.

(c) Petitioner was not denied the right of trial by jury.

(d) The admission of Florida into the Union did not transmute Florida constitutional provisions into federal rights.

(e) The phrase "republican form of government" connotes political rather than judicial questions.

(f) Florida's constitution is in no sense an act of Congress.

A. Petitioner's Third Question Was Never Raised Nor Decided In The Lower Courts.

Nowhere in his petition for certiorari (neither in the Jurisdictional Statement, p. 6, nor elsewhere) nor in his

supporting brief, does Petitioner specify how, when or where he claims to have raised this question in the lower courts. Nowhere in his petition or brief does he disclose an adverse decision of the lower courts on this point. Nowhere does he give record references to indicate how, when or where he claims to have "specially set up" his claim or to indicate how the lower courts disposed of it.

Naturally not, for he never raised any such proposition, in either the trial court or the Supreme Court. Nor did the Florida courts ever decide any such question. The record is barren of any such claim "specially set up" or of any decision thereof. Now, for the first time, Petitioner seeks to raise his question *here*.

Accordingly, under Section 1257 of the Judicial Code, the question is not now available; nor is it entitled to be presented, because of non-compliance with Rules 12 and 38 of this Court.

B. Petitioner Seeks Piecemeal Review.

Petitioner could just as well have raised this question on his former petition for certiorari. This question (if indeed any such question exists) is necessarily based upon the factual record that was before this Court in No. 156, October Term, 1947, 332 U.S. 774, 92 L. ed. 359. Accordingly, Petitioner should now be precluded from seeking "piecemeal" review.

C. The Judgment Of The Florida Supreme Court Did Not Deny Petitioner A Trial By Jury.

Petitioner's major promise is that the Act of Congress admitting Florida into the Union metamorphosed the state constitutional provisions into synthetic federal rights.

His minor premise is that the Florida Supreme Court denied him a jury trial in contravention of Section 3 of the Declaration of Rights in the Constitution of the State of Florida.

His implied conclusion (though not stated) is that, therefore, he has a federal question for review here.

For the moment we join issue with Petitioner's minor premise. Petitioner was *not* denied a jury trial in contravention of Section 3 of the Declaration of Rights of the Constitution of the State of Florida. Unless Petitioner *was* denied a jury trial in contravention of Section 3 of the Florida Declaration of Rights, he has no question at all, for this supposed federal question is bottomed on a supposed violation of Section 3 of the Florida Declaration of Rights.

We shall not repeat here what we said in sub-section "B" and "C" of Point II (ante. pp. 55-60) which please see. It is sufficient to say that the Florida Supreme Court in *Ball* v. *Yates,* 158 Fla. 521, 29 So. 2d 729, held that the evidence in this case was legally insufficient to make a case for the jury. The grounds of that holding are summarized at pp. 3-4, ante. Now, is such a holding a violation of Section 3 of the Declaration of Rights of the Constitution of the State of Florida?

The answer is *no,* under the decisions of the Florida Supreme Court. See *Saucer* v. *City of West Palm Beach.* 155 Fla. 659, 21 So. 2d 452, and cases cited there.[59]

[59] It is not thought that anyone can doubt that such a judgment is "decisive and controlling everywhere."

In analogous situations, this Court has invariably held that the direction of a verdict, for want of sufficient evidence, is not a violation of the 7th Amendment. See:

Randall v. *B. & O. R.R. Co.,* 109 U.S. 478, 27 L. ed. 1003; *Baylis* v. *Travelers Ins. Co.,* 113 U.S. 316, 29 L. ed. 989; *B. & C. Line* v. *Redman,* 295 U.S. 654, 79 L. ed. 1636; and *Galloway* v. *U.S.,* 319 U.S. 372, 87 L. ed. 1458.

Thus it is clear that under the Florida decisions (construing the import of Sec. 3, Declaration of Rights, Florida Constitution) Petitioner was not deprived of a jury trial, for the simple reason that the Florida courts found, as a matter of law, that Petitioner *had no case to go to the jury.*[60]

So the question Petitioner poses is purely hypothetical. No matter which way this Court might decide it, the judgment of the Florida Supreme Court still stands.

D. The Admission Of Florida Into The Union By Act Of Congress Did Not Transmute The Jury Trial Provision Of The Florida Constitution Into A Federal Right.

From here on we argue Petitioner's purely hypothetical question. For that reason, we shall be brief.

The Territory of Florida was offered admission to the Union upon condition that it "set up a republican form of government." A proposed state constitution was adopted

[60] If that conclusion is not right, then this Court must now overrule all its decisions holding that a Federal District Judge may, under the 7th Amendment direct verdicts when there is no sufficient evidence to go to the jury. And, what is more, Rule 50 of the Federal Rules of Civil Procedure must be abrogated.

and submitted to Congress. By the Act of March 3, 1845, Congress approved it, "as republican" and admitted Florida to the Union. The following question arises:

In order for a state constitution to set up a "republican form of government," must it provide for jury trials of common law actions?

This Court held, in *Minor* v. *Hoppersett,* 88 U.S. 162, 22 L. ed. 627, that the definition of "republican form of government" is to be deduced from the organic laws of the thirteen original states. An examination of the constitutions and "charters" of the thirteen original states at the time of the adoption of the Federal Constitution discloses that they contained a wide variety of provisions as to jury trials.

In Connecticut and Rhode Island there were *no* provisions whatever requiring jury trials in any cases. In Virginia the only provision was that "the ancient trial by jury is *preferable* to any other, and *ought* to be held sacred." (This is hardly more than an exhortation.) In Delaware the provision was that "trial by jury shall be as *heretofore.*" Georgia provided for jury trial "of civil causes." (To this day Georgia tries *equity* causes before juries.) The constitution of North Carolina (neighbor of Virginia) likewise contained a mere exhortation that "trial by jury . . . . *ought* to remain sacred and inviolate." Maryland provided for jury trials "as at common law." The constitutions of the remaining original states were mandatory in requiring jury trials generally.

It is thus apparent that historically it can not be deduced that the right of trial by jury is essential to "a republican form of government."

It, therefore, can not be inferred that, when Congress accepted the Florida Constitution of 1838 as "republican," the jury trial provision thereof became a *permanent federal right.*

E. The Implications Of The Phrase "Republican Form Of Government" Are Political, Not Judicial.

It is too well settled for extended citation of authorities that questions arising from the phrase "republican form of government" (Sec. 4, Art. IV, Constitution of the United States, and such acts as the Act of March 3, 1845 admitting Florida into the Union) are "political, not judicial, in character and thus are for the consideration of the Congress, and not the courts."

Ohio v. *Akron M.P. District,* 281 U.S. 74, 74 L. ed. 711
Highland Farms Dairy v. *Agnew,* 300 U.S. 608, 81 L. ed. 835

It follows that the acts of Congress relating to the admission of Florida into the Union have no bearing on the judicial determination of this case.

F. Florida's Admission Into The Union "On Equal Footing With The Original States In All Respects Whatsoever" Does Not Render The State Constitution An Act Of Congress.

The Constitution of 1838 proposed by the people of the Territory of Florida was approved by Congress as setting up a "republican form of government," and Florida was admitted into the Union as a sovereign state "on equal footing with the original states." Act of Congress of March 3, 1845.

The Act of admission can not be construed to impose any restriction on the state judiciary which is unequal to that resting on the sister states. To hold that Section 3 of the Declaration of Rights of the Florida Constitution is a continuing federal provision, whereas corresponding provisions in the organic laws of the sister states are admittedly not so, is to destroy the equality and sovereignty of Florida.

Coyle v. *Smith,* 221 U.S. 559, 55 L. ed. 608

Despite the act of admission, Florida is at liberty to amend its constitution and to modify or abolish jury trials in civil cases. If the decisions of the Florida Supreme Court (complained of here) might be considered by construction to modify the jury trial provisions of the *state* constitution, they are nonetheless within the competence of the state. Section 4, Article IV of the U.S. Constitution and the Act of March 3, 1845, admitting Florida into the Union, are without force to confer jurisdiction for judicial review of any such action.

POINT VI.

Petitioner Is Estopped To Prosecute His Present Petition For Writ Of Certiorari By Having Heretofore Maintained A Petition For Writ Of Certiorari Upon His Express Stipulation That The Former Decision Of The Florida Supreme Court Was A Final Judgment Against Him.

On November 29, 1946, the Florida Supreme Court rendered its judgment against Petitioner (on the *third* appeal) followed by its decision, February 28, 1947, holding that two of its seven justices were not disqualified, and by its denial, March 28, 1947, of a petition for rehearing (*Ball* v. *Yates,* 158 Fla. 537, 29 So. 2d 737).

Thereupon, Petitioner sought certiorari here to review said decision (Yates v. Ball, No. 156, October Term, 1947). Petitioner asserted, at page 2 of his petition, that the aforesaid decision of the Florida Supreme Court was a "final judgment" against him within the meaning of Section 237 of the Judicial Code.

Said decision of the Florida Supreme Court apparently lacked the requisite finality to support certiorari here. Accordingly this Respondent raised the point in his brief here (pp. 5-11); which please see.

This put Petitioner to an election. He could continue to maintain, in his reply brief, that, as a matter of law, said decision of the Florida Supreme Court was, in the true sense of the word, a final judgment. If Petitioner took that position, he risked the judgment of this Court, denying his petition "for want of a final judgment."

On the other hand, Petitioner was at liberty to accept the decision of the Florida Supreme Court as a final judgment against him. If Petitioner did that, he was clearly entitled to invoke the jurisdiction of this Court to consider his petition upon its merits.[61]

Petitioner elected to accept the decision of the Florida Supreme Court as a *final* judgment against him. He did this by his self-styled "final and binding stipulation." See his Reply Brief, filed here in *Yates* v. *Ball,* No. 156, October Term, 1947. We quote Petitioner's stipulation:

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[61] The grounds of his petition were (i) denial of due process and equal protection, in violation of the 14th Amendment, resulting from the supposed disqualification of two of the seven justices of the Florida Supreme Court for bias and prejudice, and (ii) denial of a jury trial contrary to the 7th Amendment (aided by the 14th Amendment). See Petition No. 156, October Term, 1947, in this case.

"The issue of the finality of this judgment is entirely a sham. This case has been tried three times in a nisi prius court. There is no reason for the Supreme Court of Florida, for the respondent or for anyone else to think that the petitioner has any new evidence to present in any new trial of this case in any court. The petitioner states now and has always stated that all new evidence has been presented to the trial court in the previous trials. This may be accepted as a final and binding stipulation as to this matter on petitioner's part.

"Thus, the action directed by the Supreme Court of Florida is a mere 'ministerial act' within the doctrine of Clark v. Williard, 292 U.S. 112, 117-119, 133 (1934). See Brady v. Terminal Railroad Association, 302 U.S. 678 (1937); Brady v. Southern Railway Company, 319 U.S. 777 (1943). Petitioner's case has been put in evidence, and there is nothing more to be done."

It is recognized that a mistaken argument or an unfounded position taken in a brief affords no basis of estoppel. But that is not the situation in the case at bar. Here we have an election to accept the decision of the Florida Supreme Court (*Ball* v. *Yates,* 158 Fla. 537, 29 So. 2d 737) as a "final judgment" by a "binding stipulation" filed in this Court, in order to invoke this Court's jurisdiction to consider his petition for certiorari on its merits and to avoid a denial thereof for want of a final judgment.

Having elected to take *that* position for *that* purpose, Petitioner may not now, in a subsequent state of the litigation, take a flatly *contrary* position for *another* purpose (i.e. to get a new trial).

By his acceptance of the former judgment of the Florida Supreme Court as "final", in his self-styled "final and binding stipulation," Petitioner successfully avoided the denial

of his petition for certiorari by this Court for want of a final judgment, and gained consideration by this Court of the prima facie merits of his constitutional questions (*Yates* v. *Ball,* 332 U.S. 774, 92 L. ed. 359). Petitioner may not now gainsay his "final and binding stipulation."

The law of Florida on this point is well settled. See

Warren v. *Warren,* 73 Fla. 764, 75 So. 35;

Lyle et al v. *Hunter,* 102 Fla. 972, 136 So. 633;

United States Fidelity & Guaranty Co. v. *Snite,* 106 Fla. 702, 143 So. 615;

Palm Beach Company v. *Palm Beach Estates, et al.,* 110 Fla. 77, 148 So. 544;

Lee v. *Fowler,* 115 Fla. 429, 155 So. 647;

State v. *Lee,* 126 Fla. 396, 171 So. 333;

Crosby v. *Burleson,* 142 Fla. 443, 195 So. 202.

The cognate rule (that an election to pursue one remedy on a basic theory precludes subsequent pursuit of another remedy on an inconsistent theory) is likewise well settled in Florida. See

Griffin v. *Jacksonville T. & K. W. Ry. Co.,* 33 Fla. 606, 15 So. 338;

Campbell v. *Kauffman Milling Co.,* 42 Fla. 328, 29 So. 435;

Am. Process Co. v. *Fla. White Pressed Brick Co.,* 56 Fla. 116, 47 So. 942;

Capital City Bank v. *Hilson,* 64 Fla. 206, 60 So. 189;

Weeke v. *Reeve,* 65 Fla. 374, 61 So. 749;

Intertype Corp. v. *Pulver,* 101 Fla. 1176, 135 So. 793;

Ziegler v. *Brown,* 112 Fla. 421, 150 So. 608;

McCormick v. *Bodeker,* 119 Fla. 20, 160 So. 483;

State ex rel. v. *Harrison,* 138 Fla. 874, 190 So. 483;

Armour & Co. v. *Lambdin,* 154 Fla. 86, 16 So. (2d) 805;

Hays v. *Weeks,* 57 Fla. 73, 48 So. 997;

Fla. Home Ins. Co. v. *Bozeman,* 58 Fla. 424, 50 So. 413;

McKinnon v. *Johnson,* 59 Fla. 332, 52 So. 288;

Mizell Live Stock Co. v. *J. J. McCaskill Co.,* 62 Fla. 239, 56 So. 391;

Malsby v. *Gamble,* 63 Fla. 508, 57 So. 687;

Flynn-Harris-Bullard Co. v. *Hampton,* 70 Fla. 231, 70 So. 385;

Seaboard Air Line Ry Co. v. *Hartline,* 84 Fla. 133, 92 So. 813;

Bond v. *Hewitt,* 111 Fla. 180, 149 So. 606;

Gralynn Laundry, Inc. v. *Va. Bond & Mortgage Corp.,* 121 Fla. 312, 163 So. 706;

Williams v. *Robineau,* 124 Fla. 422, 168 So. 644;

State, ex rel v. *City of Panama City,* 126 Fla. 776, 171 So. 760;

Board of Public Inst. v. *Mathis,* 132 Fla. 289, 181 So. 147;

Gibson v. *Am. Ins. Co., et al,* 146 Fla. 171, 200 So. 357;

Beaty v. *Inlet Beach, Inc.* 151 Fla. 495, 9 So. (2d) 735; 152 Fla. 276, 10 So. (2d) 807;

Marks v. *Fields,* 36 So. (2d) 612.

Following this Court's decision on the former petition for certiorari (332 U.S. 774, 92 L. ed. 359) the mandate of the Florida Supreme Court issued to the trial court (R. 1-9).

Thereupon Respondent moved the trial court, pursuant to said mandate, for a rule nisi to Petitioner to show cause

(R. 9-12). Therein Respondent raised, inter alia, the question of the estoppel of Petitioner to ask for a new trial. Upon the rule nisi, Petitioner filed his response and supplemental response (R. 14-16; 59-63). Then Respondent moved the trial court for the entry of final judgment for Respondent, again raising said question of Petitioner's estoppel (R. 63-66). In due course, the trial judge entered final judgment for Respondent (R. 67-70). In doing so, the trial judge declined to consider the question of estoppel because he thought same not to be within the scope of the inquiry directed by the Supreme Court in its opinion, *Ball* v. *Yates*, 158 Fla. 537, 29 So. 2d 729; but entered judgment on the ground of the legal insufficiency of Petitioner's evidence to make a case for a jury trial (R. 69).

Petitioner appealed (R. 70-71). In opposing reversal of the judgment of the trial court, Respondent again urged the estoppel (R. 70-71). The judgment of affirmance of the Supreme Court (R. 102) does not disclose whether it rested on *this* ground or on the ground stated by the trial court (the legal insufficiency of the evidence to make a jury case).[62]

Under the Florida law (cited just above) the Supreme Court may well have affirmed on the ground that Petitioner was estopped. But that is not the question here.

The question here *is* that Petitioner is estopped to prosecute *this* petition for certiorari, by his having stipulated (in order to make sure of this Court's jurisdiction on his former petition for certiorari) that the *former* judgment of the Florida Supreme Court was "final."

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[62] One thing appears certain. The decision of a Federal question can not be attributed to the Florida Supreme Court's decision for the simple reason that no such question was raised either in the trial court or in the Supreme Court (R. 14-16; 59-63; 71).

A careful examination of the reported decisions of this Court indicates that this Court has apparently not heretofore considered and decided this precise question.

However, the doctrine of quasi-estoppel in judicial proceedings is so well settled that it ought to be applied to the case at bar. The rule is that if a litigant takes a certain position for *one* purpose he may not in a subsequent stage of the litigation take an inconsistent position for *another* purpose.

In the case at bar, Petitioner, in order to assure himself of jurisdiction here for the consideration of his constitutional thesis on the former petition for certiorari, stipulated his acceptance of the former judgment of the Florida Supreme Court as final. He was successful. He received this Court's consideration of the questions he raised. His petition was not denied for want of a final judgment below, but rather because his constitutional questions lacked merit.[63]

Accordingly we urge that the present petition for certiorari should be denied because Petitioner is estopped to maintain same.

[63] It is not essential to the application of the doctrine of quasi-estoppel in judicial proceedings, that the litigant should *win his case*. All that is essential is that he accomplish the limited purpose for which he took the position. In the case at bar, Petitioner accomplished his purpose; he avoided total disregard of his petition for want of a final judgment.

CONCLUSION

It is therefore, respectfully urged that the petition for writ of certiorari should be denied:

(i) Because this Court in this case has already declined to review substantially the same questions that are raised in the present petition.

(ii) Because the petition and its supporting brief violate Rule 12, Par. 1, and Rule 38, Par. 2 of the Rules of this Court.

(iii) For want of a substantial federal question.

(iv) Because the judgment sought to be reviewed, is based upon independent, adequate non-federal grounds.

(v) Because Petitioner is estopped to maintain this petition.

(vi) Because none of the questions attempted now to be raised (but not raised in his former petition for certiorari) was raised or decided in the lower courts.

Respectfully submitted,

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